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COMMENTS

ZELMAN V. SIMMONS-HARRIS: IS THE SUPREME COURT'S LATEST WORD ON SCHOOL VOUCHER PROGRAMS REALLY THE LAST WORD?

*Sara J. Crisafulli**

INTRODUCTION

Senel and Jacqueline Taylor are residents of Cleveland, Ohio, and the parents of Saletta, who received a voucher from the Cleveland Scholarship and Tutoring Program.[1] Saletta, their ten-year-old daughter, currently attends Second New Hope Christian Academy, a private Christian school.[2] The Taylors were overjoyed to be participants in the Cleveland voucher program, part of Ohio's Pilot Project Scholarship Program.[3] Without these funds, they could not afford a private school such as Second New Hope, and Saletta would have to attend the public school where her previous experiences had been negative.[4] According to Mr. Taylor, Saletta's progress since her arrival at Second New Hope has been substantial:

> She has been in the program for two years. The scholarship has allowed Saletta the opportunity to receive an excellent education.
>
> ... [In public school,] ... [s]he failed first grade and had to repeat it ....
>
> Saletta's progress at Second New Hope Christian Academy has been excellent. Her grades have improved dramatically ... [and she] is excellent in school.

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* J.D. Candidate, 2004, Fordham University School of Law. I am grateful to Father Charles Whelan for his guidance and assistance with this Comment. I would like to thank my friends and family, especially my parents Santo and Phyllis Crisafulli, and my sister Stefanie, for their unwavering love, support and encouragement in all my endeavors.

1. Affidavit of Senel Taylor, App. W, J.A. at *173a, Simmons-Harris v. Zelman, 122 S. Ct. 2460 (2002) (No. 00-1751, 00-1777, 00-1779).
2. *Id.*
3. *Id.*
4. *Id.* at *173a-74a.

> We chose to send Saletta to Second New Hope . . . [because] the level of participation of the teachers . . . is greater than at the public schools. . . .
>
> [T]he teachers give feedback to parents. . . . There is much more interaction between the teacher and the parents at Second New Hope than at public school.
>
> If the Cleveland Scholarship and Tutoring Program is not allowed to continue, Saletta will have to go back to public school. My wife and I cannot afford to send her to Second New Hope without the scholarship. This would be devastating for Saletta. She has had so much success at Second New Hope, and I know that this would not continue if she has to return to public school.[5]

One can imagine that voucher program recipients such as the Taylors were thrilled that the Supreme Court recently upheld the Cleveland program, a decision that came as a surprise to many.[6]

The Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*[7] had a significant impact on the lives of Ohio residents, such as Saletta and her parents, by upholding the school voucher portion of the Ohio Pilot Project Scholarship Program[8] ("voucher program") against an Establishment Clause challenge. The Ohio State legislature enacted the voucher program to provide improved educational opportunities to students attending inner-city public schools in the Cleveland school district by providing students with funds to attend private schools as an alternative to failing public schools.[9]

The *Zelman* decision marked a significant departure from previous Establishment Clause cases. In *Zelman*, the Court held that the Ohio voucher program providing tuition assistance to low-income families whose children attend one of Cleveland's inner-city public schools did not violate the Establishment Clause.[10] The Court so held despite the fact that 96% of the program's participants attended private sectarian schools, and thus the program was primarily funding religious education.[11] In upholding the Ohio program, the majority emphasized the "genuine and independent private choice" that Ohio's program afforded parents in determining where to send their children to

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5. *Id.*

6. *See infra* note 17 and accompanying text; *see also* Vanessa Blum, *Both Sides Head for the Next Battleground*, Legal Times, July 1, 2002, at 8 ("[T]he ruling elicited an outcry from those opposing school vouchers and favoring a strict barrier between government and religion.").

7. 122 S. Ct. 2460 (2002).

8. Ohio Rev. Code Ann. §§ 3313.974-.979 (Anderson 2002).

9. *See infra* Part II.A.

10. *Zelman*, 122 S. Ct. at 2465-67; *see infra* notes 220-26 and accompanying text (further explaining Ohio's reasons for creating the voucher program).

11. *Zelman*, 122 S. Ct. at 2464.

school.[12]

Despite the *Zelman* majority's finding that the Cleveland program offered parents a genuine choice in selecting a school for their children, the voucher program, in fact, provided no alternative to private, sectarian education.[13] While participation in the program was open to public and private schools alike, no public schools participated, and over 80% of the private schools participating were sectarian.[14] Although the facts indicate that the state is subsidizing education in religious schools, the Court found that the voucher program did not create financial incentives for parents to choose religious schools over nonreligious schools.[15] In fact, the Court stated that the Ohio Program actually created a financial "disincentive" for parents to choose sectarian education because parents who elected to send their children to a private school were required to shoulder a portion of the tuition.[16]

While *Zelman* did not overrule any of the Court's previous Establishment Clause cases outright, the decision effectively removed the Establishment Clause barrier to school voucher programs that provide state aid to sectarian schools.[17] Prior to *Zelman*, the Supreme Court had never upheld a school aid program with the features of the Ohio program.[18] In fact, a program such as Ohio's, which gives unrestricted aid to sectarian schools in order to fund the basic education of students, is more comparable to the programs that the Court has previously struck down than to those it has upheld.[19] Until *Zelman*, the Court had consistently invalidated programs that provided direct, unregulated aid to sectarian schools[20] for violating the Establishment Clause of the First Amendment,[21] according to which

12. *Id.* at 2467.

13. *See infra* notes 230-35 and accompanying text (discussing the fact that no public schools actually participated in the voucher program, and therefore parents had no alternatives to sectarian schools).

14. *Zelman*, 122 S. Ct. at 2464.

15. *Id.* at 2468.

16. *Id.*

17. Marcia Coyle, *The Man Behind the School Voucher Win*, Nat'l L.J., Dec. 24, 2002, at A12 ("The decision in Zelman v. Simmons-Harris . . . is considered by many experts to be the most important church-state ruling in decades." (citations omitted)).

18. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by Mitchell*, 530 U.S. at 793; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); *see infra* Part I.A.

19. For programs that the Court struck down, see *Nyquist*, 413 U.S. 756, and *Lemon*, 403 U.S. 602. For programs the Court upheld, see *Mitchell*, 530 U.S. 793; Agostini v. Felton, 521 U.S. 203 (1997); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); and Everson v. Bd. of Educ., 330 U.S. 1 (1947).

20. *See supra* note 19 (citing cases in which the Court struck down school aid programs).

21. The Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Everson*, 330 U.S. at 8.

"Congress shall make no law respecting an establishment of religion . . . ."[22] As such, the Establishment Clause prevents states from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion.[23]

In addition to ignoring seemingly controlling cases, the *Zelman* Court left a great deal of uncertainty as to how future Establishment Clause challenges to voucher programs will be resolved. Although the presence of a genuine and independent choice among educational alternatives was a decisive factor in *Zelman*, the Court did not offer any guidance as to what constitutes a "choice" under Establishment Clause analysis or what makes parental choice "genuine and independent."[24] This Comment explores the extent to which *Zelman* departed from the Court's prior Establishment Clause cases, and argues that *Zelman* does not open the door to all future voucher programs.

Part I of this Comment provides a brief history of the Court's Establishment Clause jurisprudence, from the 1947 case of *Everson v. Board of Education of Ewing Township* to the 2000 *Mitchell v. Helms* decision. Section A examines the cases from *Lemon v. Kurtzman* through *Aguilar v. Felton*, which held that direct aid to sectarian schools as well as programs creating incentives to choose sectarian education were impermissible. Section B analyzes the Court's policy of upholding school aid programs which provided neutrally available benefits and in which the private choices of individuals directed the aid to religious institutions. Section C looks at the shift in the Court's Establishment Clause jurisprudence—beginning with *Agostini v. Felton*—toward allowing some degree of aid to religious institutions.

Part II focuses on the Court's most recent school aid decision, *Zelman v. Simmons-Harris*. It presents relevant background on the implementation of the Cleveland school voucher program, and traces the *Zelman* lawsuit from the state courts to the United States Supreme Court.

Part III addresses the practical implications of the *Zelman* decision. Specifically, section A answers the question of whether the *Zelman* Court "misapplied its own precedent." Although at first glance the *Zelman* decision appears to contravene the Court's precedent, in fact *Zelman* only adjusts the focus of those previous cases without explicitly contradicting them. Section B argues that even after *Zelman*, not all voucher programs will be permissible. Based on the Court's analysis of the Cleveland program, a voucher program will not withstand an Establishment Clause challenge unless it is closely modeled on the Cleveland voucher program in terms of available

22. U.S. Const. amend. I.
23. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2465 (2002).
24. *See infra* Part III.B.

educational alternatives and genuine parental choice. While the Court does not define "genuine choice," a program that does not provide adequate secular alternatives to sectarian education is unlikely to pass constitutional muster.

I. AN HISTORICAL OVERVIEW OF SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

A brief synopsis of the Court's Establishment Clause jurisprudence is important to understand how *Zelman* differs from its precedent. During the past sixty years, the Supreme Court has addressed numerous Establishment Clause challenges which raise the question of the permissibility of using public funds or resources to aid secular education in private, sectarian schools.[25] Although the outcome in each case was highly dependent on the specific elements of the program in question, the Supreme Court did pinpoint certain attributes that were crucial to holding school aid programs constitutional. Specifically, the Court has upheld programs providing bus transportation to students attending religious schools;[26] programs loaning secular textbooks to private school students;[27] and most recently, a program providing educational aid to private sectarian schools in the form of computers and books.[28] Because these programs provided "secular, neutral, or nonideological services, facilities, or materials . . . . in common to all students,"[29] "regardless of the type of school they attended,"[30] the Court found no danger of governmental endorsement of religion.

The Court has consistently struck down as impermissible under the Establishment Clause programs paying both the salaries of sectarian teachers with public funds[31] and tuition reimbursements available only to private school students.[32] This part examines the period in which the Supreme Court found almost all aid to sectarian schools unconstitutional, beginning with *Lemon v. Kurtzman*[33] in 1971 and concluding with *Aguilar v. Felton*[34] in 1985. It then discusses the programs the Court upheld in which state aid was neutrally available

25. *See, e.g.*, *Zelman*, 122 S. Ct. 2460; Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); *Everson*, 330 U.S. 1.

26. *Everson*, 330 U.S. at 17-18.

27. *Allen*, 392 U.S. at 248-49.

28. *Mitchell*, 530 U.S. at 835.

29. *Lemon*, 403 U.S. at 616.

30. *Allen*, 392 U.S. at 241.

31. *Lemon*, 403 U.S. at 606-07.

32. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973).

33. 403 U.S. 602 (1971).

34. 473 U.S. 402 (1985).

and the private choices of individual beneficiaries determined if the funds benefited sectarian schools. Finally, this part considers the shift in the Court's Establishment Clause jurisprudence from *Agostini v. Felton*[35] to the most recent decision in *Zelman v. Simmons-Harris*.[36]

A. *From* Lemon *to* Aguilar

The Court first addressed the constitutionality of aid to sectarian schools in 1947 in *Everson v. Board of Education*.[37] The *Everson* Court upheld a New Jersey program which provided school bus transportation to both public and private school students.[38] The Court analogized the provision of transportation to a neutral government service, such as police protection, which is available to all individuals without reference to religious beliefs.[39]

In 1968, the Court in *Board of Education of Central School District No. 1 v. Allen*[40] followed the *Everson* reasoning to uphold a government program that provided textbooks to all students in seventh through twelfth grades. The neutrality and general availability of the textbooks in the *Allen* program enabled the Court to find the benefits permissible under the Establishment Clause even though sectarian schools thereby benefited.[41] Following *Everson* and *Allen*, however, the Court changed its approach toward aid to sectarian schools.

1. *Lemon*: State Subsidization of Religious Indoctrination Is Impermissible

After upholding the provision of bus services in *Everson*,[42] and textbooks in *Allen*,[43] to both public and private school students, the Supreme Court in *Lemon v. Kurtzman*[44] established a new and significant precedent forbidding direct aid to sectarian schools. *Lemon* held that the Establishment Clause prohibits government payment of sectarian schoolteachers' salaries[45] and struck down two such programs[46]—one in Rhode Island[47] and one in Pennsylvania.[48] In

35. 521 U.S. 203 (1997).
36. 122 S. Ct. 2460 (2002).
37. 330 U.S. 1 (1947).
38. *Id.* at 18.
39. *See infra* notes 121-34 and accompanying text.
40. 392 U.S. 236 (1968).
41. *See infra* notes 135-41 and accompanying text.
42. Everson v. Bd. of Educ., 330 U.S. 1 (1947).
43. Bd. of Educ. v. Allen, 392 U.S. 236 (1968).
44. 403 U.S. 602 (1971).
45. *Id.* at 606-07.
46. The Pennsylvania program "provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries" and other educational equipment. *Id.* Under the Rhode Island statute, "the State pays directly to teachers in nonpublic elementary schools a supplement of 15%

so doing, the Court created a three-prong test for determining whether a governmental action violates the Establishment Clause.[49] The *Lemon* test requires that a "statute . . . have a secular legislative purpose; . . . [that] its principal or primary effect . . . be one that neither advances nor inhibits religion[;] . . . [and that] the statute . . . not foster 'an excessive government entanglement with religion.'"[50] Although the *Zelman* Court did not directly apply the *Lemon* test in its analysis, the test has never been expressly overruled. In 1997, Justice O'Connor's opinion in *Agostini* rephrased the effects prong of the *Lemon* test, but the purpose and application of the test remain unchanged.[51]

Additionally, the *Lemon* Court closely examined the "character and purposes of the institutions that are benefited" by the state-funded programs at issue.[52] The Court created a profile of pervasively sectarian schools, which were ineligible to receive program benefits, and concluded that "the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.'"[53] Religion pervades both the curriculum and the environment at *Lemon*-type sectarian schools, and religious instruction is mandatory for all students.[54] According to *Lemon*, sectarian schools are often located close to churches; the schools' buildings, classrooms, and hallways "contain identifying religious symbols"; teachers conduct "direct religious instruction" and "religiously oriented extracurricular activities"; a majority of the teachers are nuns; and the overall atmosphere is one in which "religious instruction and religious vocations are natural and proper parts of life in such schools."[55]

The *Lemon* Court found that the Pennsylvania and Rhode Island salary supplement programs were unconstitutional not only because they directly funded sectarian education but also because the state would have had to monitor the teachers to enforce compliance with the statutory restrictions and to ensure that the state was not funding religious indoctrination of schoolchildren.[56] This need for constant

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of their annual salary." *Id.* at 607.

47. Rhode Island's Salary Supplement Act was enacted in 1969. R.I. Gen. Laws Ann. § 16-51-1 to 16-51-9 (2001) (repealed 1980).

48. In 1968, Pennsylvania passed the Nonpublic Elementary and Secondary Education Act in response to a "crisis" in Pennsylvania's private schools caused by increasing costs. Pa. Stat. Ann. tit. 24, §§ 5601-09 (West 1992) (repealed 1977).

49. *Lemon*, 403 U.S. at 612-13.

50. *Id.* (citations omitted).

51. Agostini v. Felton, 521 U.S. 203, 232-33 (1997); *see infra* notes 361-65 and accompanying text (discussing the *Zelman* Court's use of the *Agostini*-modified *Lemon* test).

52. *Lemon*, 403 U.S. at 615.

53. *Id.* at 616 (citing the findings of the District Court of Rhode Island).

54. *Id.* at 615.

55. *Id.*

56. *Id.* at 618-20.

monitoring of the curriculum and classroom activities would have resulted in excessive entanglement between church and state, impermissible under the Establishment Clause.[57] The schools benefiting from the programs which *Lemon* scrutinized provided education aimed at deepening the faith of students, and this function could not be eliminated by state surveillance.[58]

Although both the Rhode Island and Pennsylvania programs afforded parents a choice in determining whether to send their children to private or public school, the Court found that the element of free choice was outweighed by the direct aid to church-related schools.[59] The Court distinguished the direct aid programs in *Lemon* from the supplemental aid programs upheld in *Everson*[60] and *Allen*,[61] and found that in these cases "state aid was provided to the student and his parents—not to the church-related school."[62] According to the Court, direct subsidization of sectarian education aimed at the religious formation of schoolchildren was the equivalent of governmental indoctrination in contravention of the Establishment Clause.[63] Thus, *Lemon* began a line of cases in which the Court held unconstitutional almost every form of aid to sectarian schools, whether direct or indirect.

2. *Nyquist*: Benefits Available Only to Students Attending Sectarian Schools Impermissibly Endorses Religion

In 1973, the Court's decision in *Committee for Public Education v. Nyquist*[64] adopted the reasoning of *Lemon* in invalidating a New York program, the Elementary and Secondary Education Opportunity Program,[65] which provided partial tuition reimbursements to sectarian and non-sectarian private school students without regulating the use of this aid.[66] The New York legislature instituted this program to prevent a decrease in private school enrollment caused by the high cost of private education, which would, in turn, burden the public school system.[67] In creating the reimbursement program, the legislature had determined that a "precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs" and would "aggravate an already serious fiscal crisis in public education" and thereby "seriously jeopardize

57. *See infra* text accompanying notes 386-89.
58. *Lemon*, 403 U.S. at 618-20.
59. *Id.* at 621.
60. Everson v. Bd. of Educ., 330 U.S. 1 (1947); *see infra* Part I.B.1.
61. Bd. of Educ. v. Allen, 392 U.S. 236 (1968); *see infra* Part I.B.2.
62. *Lemon*, 403 U.S. at 621.
63. *Id.* at 621, 625.
64. 413 U.S. 756 (1973).
65. N.Y. Educ. Law §§ 559-63 (McKinney 2000).
66. *Nyquist*, 413 U.S. at 780.
67. *Id.* at 764-65.

quality education for all children."[68]

Despite the legislature's clearly secular purpose, the *Nyquist* Court held that the program impermissibly endorsed sectarian education[69] because the benefits of the tuition reimbursements were available only to parents of students of private schools, the majority of which were sectarian.[70] In addition, the Court held that the provision of unrestricted, direct aid for the benefit of sectarian schools contravened the Establishment Clause,[71] and reasoned that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."[72] According to the Court, the New York program created a financial incentive for parents to choose sectarian education over public education,[73] and "[w]hether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same" and still impermissible.[74]

The *Nyquist* Court, however, expressly stated that it did not answer the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[75] That the *Nyquist* Court reserved judgment on this question is not relevant to *Zelman* because the program at issue in *Zelman* was not a scholarship program. The Cleveland voucher program did not provide merit-based funding, but rather funded basic tuition costs at sectarian schools.[76] However, this unanswered question may arise in future cases involving school aid in the form of academic scholarships.

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68. N.Y. Educ. Law § 559(3).

69. *Nyquist*, 413 U.S. at 794 (finding that "the challenged sections have the impermissible effect of advancing religion").

70. *Id.* at 780 ("The state program is designed to allow direct, unrestricted grants of $50 to $100 per child . . . as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation.").

71. *Id.*

72. *Id.*

73. *Id.* at 786-87 (stating that "if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions").

74. *Id.* at 786. Justice Powell continued: "In sum, we agree with the conclusion of the District Court that '(w)hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance.'" *Id.* at 786-87.

75. *Id.* at 782 n.38; *see also* Jarod Bona, *School Vouchers*, 37 Harv. J. on Legis. 607, 611 (2000) (discussing *Nyquist*'s impact on the constitutionality of Florida's Ak Plan for Education, a recently enacted statewide voucher program).

76. *See infra* Part II.A.

3. *Meek*: Direct, Divertible Aid Impermissibly Advances Religion

In 1975, the Court again invalidated a state-sponsored program that provided direct and divertible aid to sectarian schools. In *Meek v. Pittenger*,[77] the Court considered the constitutionality of a Pennsylvania statute[78] that created three separate programs—one to lend instructional materials and equipment to nonpublic schools, one to provide auxiliary services on private school grounds by public schoolteachers,[79] and one to lend textbooks appropriate for use in public schools to nonpublic school students. In separate opinions, six Justices voted to uphold the loan of textbooks directly to students in private schools.[80] These opinions analogized the Pennsylvania program to the textbook loan program approved in *Allen*, which "merely [made] available to all children the benefits of a general program to lend school books free of charge."[81] The *Meek* Court found nothing in the textbook loan program which offended the Establishment Clause.[82]

In contrast, the Court held that both the program lending educational equipment to religious schools and the program providing auxiliary services to such schools were unconstitutional.[83] Whereas the textbooks were provided directly to all students in public and private schools, the loan of instructional equipment and materials directly to schools which fit the profile of *Lemon*-type sectarian schools created the "impermissible primary effect of advancing religion."[84] More than 75% of the schools which would benefit from the program were religiously affiliated institutions where religious doctrine was intricately woven into all aspects of education.[85] The Court concluded that "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school

77. 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

78. 24 Pa. Cons. Stat. Ann. § 9-972 (1992) (repealed 1975).

79. The statute provided that:

> "Auxiliary services" means guidance, counseling and testing services; psychological services; visual services . . .; services for exceptional children; remedial services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, nonideological services as are of benefit to all school children and are presently or hereafter provided for public school children of the Commonwealth.

§ 9-972.1(b); *Meek*, 421 U.S. at 353 n.2.

80. *Meek*, 421 U.S. at 359 (Stewart, J., joined by Blackmun & Powell, JJ.); *id.* at 385 (Burger, C.J., concurring in part, dissenting in part); *id.* at 387 (Rehnquist, J., joined by White, J., concurring in part, dissenting in part).

81. *Id.* at 362.

82. *Id.*

83. *Id.* at 367-72.

84. *Id.* at 365-66.

85. *Id.* at 364.

enterprise as a whole."[86]

Moreover, the *Meek* Court found that the provision of auxiliary services on the premises of private schools by public schoolteachers resulted in excessive entanglement between church and state.[87] According to the Court, which drew similarities between *Meek* and *Lemon*, the state would have to monitor the teachers receiving government-subsidized salaries to ensure that programs did not indoctrinate religious values and thus advance the religious mission of the sectarian schools.[88] As in *Lemon* and *Nyquist*, the Court held that the *Meek* program "create[d] a serious potential for divisive conflict over the issue of aid to religion."[89] The unavoidable excessive political and administrative entanglement effectively violated the Establishment Clause's prohibition against laws "respecting an establishment of religion."[90]

4. *Wolman*: It Is Impossible To Separate the "Secular Education Function From the Sectarian"

Two years later in *Wolman v. Walter*,[91] the Court assessed the constitutionality of an Ohio statute[92] providing various forms of publicly-funded assistance to students in sectarian schools.[93] In separate opinions, six justices upheld the provision of textbooks to sectarian school students, finding that the Ohio textbook program[94] bore a "striking resemblance to the systems approved in *Board of Education v. Allen* and in *Meek v. Pittenger*."[95]

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86. *Id.* at 366. See *infra* notes 419-20 and accompanying text for an explanation of the *Zelman* Court's treatment of this principle. *See also infra* text accompanying notes 272-73.

87. *Meek*, 421 U.S. at 370-71.

88. *Id.*

89. *Id.* at 372.

90. *Id.*; U.S. Const. amend. I.

91. 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000) (upholding state provision of textbooks; standardized testing by public school personnel; diagnostic services by public school personnel on nonpublic school premises; and therapeutic, guidance and remedial services for nonpublic school students provided by public school personnel off nonpublic school premises; but striking down program lending educational materials and equipment to sectarian school students, and field trips conducted by nonpublic school teachers to locations designated by the state).

92. Ohio Rev. Code Ann. § 3317.06 (Anderson 2002).

93. The aid provided by this statute to sectarian schools was already available to public school students. *Wolman*, 433 U.S. at 234. The Court noted that "[m]ore than 96% of the nonpublic enrollment attended sectarian schools." *Id.*

94. Ohio Rev. Code Ann. § 3317.06(A). This statute authorized the state to "purchase such secular textbooks or electronic textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks or electronic textbooks to pupils attending nonpublic schools within the district or to their parents." *Id.*; *see Wolman*, 433 U.S. at 236-38.

95. *Wolman*, 433 U.S. at 237-38 (opinion of Blackmun, J., joined by Burger, C.J., Stewart & Powell, JJ.) (citations omitted); *see also id.* at 255 (White & Rehnquist, JJ.,

The *Wolman* Court also upheld the portion of the Ohio statute that authorized state-funded standardized testing and scoring by public school personnel.[96] The Court distinguished the Ohio statute from the New York statute struck down in *Levitt v. Committee for Public Education & Religious Liberty*,[97] which the Court held impermissible because sectarian teachers prepared and administered the exams.[98] Because the religious schools did not control the content of the tests, and nonpublic school personnel did not participate in the drafting or scoring of tests, the Court reasoned that the program did not violate the Establishment Clause.[99]

Eight Justices voted to uphold the provision of diagnostic services by public school personnel on private school premises.[100] The Court analogized this program to the neutral, generally available services upheld in *Everson* and *Allen*,[101] finding that "the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion."[102] In distinguishing the diagnostic services from the auxiliary services struck down in *Meek*,[103] the *Wolman* Court found that "[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student."[104] Therefore, the Court held that Ohio could permissibly provide diagnostic services to sectarian school students.

Additionally, the *Wolman* Court upheld the provision of therapeutic, guidance, and remedial services for sectarian school students provided by public school personnel at religiously-neutral locations.[105] The Court once again distinguished this program from

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concurring in part, dissenting in part).

96. Ohio Rev. Code Ann. § 3317.06(H) (authorizing expenditure of funds "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state").

97. 413 U.S. 472 (1973).

98. *Wolman*, 433 U.S. at 239-40; *Levitt*, 413 U.S. at 482.

99. *Wolman*, 433 U.S. at 239 (Blackmun, J., writing for the Court).

100. Ohio Rev. Code Ann. § 3317.06(B), (D). The statute authorized the expenditure of funds "[t]o provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district . . . in the nonpublic school attended by the pupil receiving the service" and "[t]o provide diagnostic psychological services to pupils attending nonpublic schools within the district . . . in the school attended by the pupil receiving the service." *Id.*

101. *Wolman*, 433 U.S. at 242.

102. *Id.*

103. *Id.* at 242-44.

104. *Id.* at 244.

105. Ohio Rev. Code Ann. § 3317.06(E)-(H). These sections authorize expenditures of funds for certain therapeutic, guidance, and remedial services for students who have been identified as having a need for specialized attention. Personnel providing the services must be employees of the local board of education or under contract with the State Department

that in *Meek* because, in *Wolman*, the services were not provided on the premises of the religious school.[106] The Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement . . . ."[107]

In striking down the program lending educational equipment and materials "incapable of diversion to religious use,"[108] the Court relied on the *Meek* rationale.[109] That the State provided the materials to the students and parents rather than to the school did not change the substance of the program, and thus it was unconstitutional.[110] The Court found that "[t]he equipment [was] substantially the same; it [would] receive the same use by the students; and it [could] still be stored and distributed on the nonpublic school premises."[111] According to the Court, because it is impossible to separate "the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[112]

Finally, the *Wolman* Court addressed the permissibility of the state's provision of transportation for field trips conducted by nonpublic schoolteachers to locations designated by the state, where the nonpublic school teacher also controlled the frequency, timing, and destination of the trips.[113] The Court found that this program was unconstitutional because sectarian schoolteachers could integrate religious doctrine into the trips.[114] The state could not prevent this

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> of Health. The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.

Wolman, 433 U.S. at 244-45 (citing Ohio Rev. Code Ann. § 3317.06(G)-(I), (K) (Supp. 1976), which is currently codified as § 3317.06(E)-(H)).

106. *Wolman*, 433 U.S. at 247.

107. *Id.* at 248.

108. *Id.* at 248 & n.15 (citing Ohio Rev. Code Ann. § 3317.06(B)-(C) (Supp. 1976)). The statute authorized the expenditure of funds

> To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials [and equipment] as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

Ohio Rev. Code Ann. § 3317.06(B).

109. *Wolman*, 433 U.S. at 250-51.

110. *Id.*

111. *Id.* at 250.

112. *Id.*; *see infra* notes 419-20 and accompanying text (explaining the *Zelman* Court's treatment of this principle); *see also infra* notes 272-73 and accompanying text.

113. *Wolman*, 433 U.S. at 252 (citing Ohio Rev. Code Ann. § 3317.06(L) (Supp. 1976) which authorized the state "[t]o provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district").

114. *Wolman*, 433 U.S. at 254.

integration without constant monitoring, and therefore there would be an excessive entanglement of church and state.[115] Because field trips were "an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct."[116]

The *Wolman* Court essentially upheld only programs providing neutral services, such as textbooks, standardized testing, and diagnostic, guidance, and remedial services. In doing so, the Court was consistent with *Lemon*, *Nyquist*, and *Meek*, which rejected programs providing substantial aid to the religious goal of sectarian schools.[117] In each case, the Court found that the educational function could not be separated from the religious mission of the sectarian schools, and therefore aid to the educational function necessarily resulted in the impermissible endorsement of religion.[118]

This period in the Court's Establishment Clause jurisprudence concluded with *Aguilar v. Felton*,[119] in which the Court struck down a New York program providing remedial assistance in sectarian schools.

B. *The Survivors: Neutral, Private Choice Programs Withstand Establishment Clause Challenges*

Whereas the Court continually struck down government programs offering direct, divertible aid to sectarian schools,[120] it consistently upheld programs that provided neutral, generally available aid to both private and public school students alike. In many cases that will be surveyed in this part, the Court found that programs offering parents a genuine choice in selecting private or public education did not violate the Establishment Clause.

1. *Everson*: Public Bus Transportation Available to All Students Is Permissible

In *Everson v. Board of Education of Ewing Township*,[121] the Supreme Court upheld a New Jersey program granting reimbursements to all parents paying to send their children to school on public buses, regardless of the type of school the children attended.[122] New Jersey taxpayers challenged the program, arguing

115. *Id.*
116. *Id.*
117. *See supra* Parts I.A.1-3.
118. *See supra* Part I.A.4.
119. 473 U.S. 402 (1985). The *Aguilar* program was later upheld in *Agostini v. Felton*, 521 U.S. 203 (1997); *see infra* Part I.C.1.
120. *See supra* Part I.A.
121. 330 U.S. 1 (1947).
122. *Id.* at 18. The New Jersey statute provided, in pertinent part:

> [W]hen any school district provides any transportation for public school children to and from school, transportation from any point in such

that the Establishment Clause prohibited the state from granting a tax deduction to parents for the cost of transportation to religious schools.[123] In holding the New Jersey program constitutional, the Court analogized school busing programs to public benefits which are available to all citizens and do not define recipients based on religious criteria, such as police and fire protection.[124] Moreover, the Court found it compelling that "[t]he State contributes no money to the schools."[125] The New Jersey statute did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[126] The Court held that transportation was a neutral, supplemental service, unrelated to the religious purpose of sectarian schools, and therefore constitutional.[127]

The bus program did not require the government to enter sectarian schools, and because the state gave reimbursements directly to parents, public funds never reached the "coffers of religious schools."[128] The legislation also served the secular purpose of protecting the welfare of all the state's schoolchildren.[129]

The *Everson* Court had to reconcile the tension between the Establishment Clause,[130] which had historically been interpreted as allowing "no aid" to religious institutions,[131] and the Free Exercise Clause,[132] which prohibits discrimination based on religious beliefs.[133]

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established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school. . . .

Id. at 3 n.1 (citing 1941 N.J. Laws 191; N.J. Rev. Stat. § 18:14-8).

123. *Everson*, 330 U.S. at 3-4.

124. *Id.* at 17-18. The Court reasoned that "[s]uch services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions." Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781-82 (1973) (citation omitted) (quoting *Everson*, 330 U.S. at 18). *Everson*, however, did not hold that the government must include nonpublic school children in the safe transportation programs.

125. *Everson*, 330 U.S. at 18.

126. *Id.*

127. *Id.* at 17-18. In upholding the New Jersey statute, the Court found that, although it did not violate the command of the Establishment Clause, the legislation "approache[d] the verge" of constitutional power. *Id.* at 16.

128. Agostini v. Felton, 521 U.S. 203, 228 (1997).

129. *Everson*, 330 U.S. at 17.

130. U.S. Const. amend. I; *see supra* text accompanying notes 21-23.

131. *See* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 341, 342 (1999) (discussing the "no aid" theory as the "no money flow" theory); *see also* Richard T. Weicher, Note, *If a Public School Is Labeled "Failing," Could More Really Be Less?*, 77 Notre Dame L. Rev. 293, 295-98 (2001) (noting that the *Everson* Court "rejected a strict no-aid approach to interpreting the First Amendment"). *See generally* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001) (discussing the evolution of the modern Establishment Clause).

132. U.S. Const. amend. I ("Congress shall make no law respecting an

Everson's "non-discrimination" theory, namely that government may not advance or inhibit religion, replaced the more antiquated view that the Establishment Clause permits no aid of any kind to religious institutions.[134]

2. *Allen*: State Provision of Textbooks to All Students Is Constitutional

In 1968, in *Board of Education v. Allen*,[135] the Court relied on the *Everson* rationale to uphold a New York program allowing local school boards to lend secular textbooks to all schoolchildren in grades seven through twelve.[136] The implementation of the New York program in *Allen* was prompted by findings that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." [137] The program required the local board of education to purchase and approve all of the loaned textbooks, thereby ensuring the secular nature of the texts.[138]

Although recognizing that "books are different from buses" in that books could potentially have religious content, the *Allen* Court assumed that school officials were not "unable to distinguish between secular and religious books."[139] Because the program defined recipients neutrally, and the services provided were available to all students, the Court found that the New York statute was permissible under the Establishment Clause.[140] Additionally, the textbooks that

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establishment of religion, or prohibiting the free exercise thereof . . . .").

133. *Everson*, 330 U.S. at 16. The Court articulated the tension within the First Amendment as follows:

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.

Id.

134. *Id.* at 18. According to the Court, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.*

135. 392 U.S. 236 (1968).

136. *Id.* at 241-42.

137. *Id.* at 239 (footnote omitted).

138. *Id.* The New York State program loaned "'text-books which [we]re designated for use in any public, elementary or secondary schools of the state or [we]re approved by any boards of education,' and which . . . 'a pupil [was] required to use as a text . . . in a particular class in the school he legally attend[ed].'" *Id.* (footnote omitted).

139. *Id.* at 244-45. Justice White added that "[i]n judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content." *Id.* at 245.

140. *Id.* at 248-49 (finding that the New York statute did not coerce "individuals in

the state provided were supplemental to the services offered by the religious schools and totally unrelated to the schools' religious purpose.[141]

3. *Mueller*, *Witters* and *Zobrest*: The Private Choices of Individuals Channel Aid to Sectarian Schools

As in *Everson* and *Allen*, the *Mueller v. Allen*[142] Court upheld a Minnesota tax deduction program[143] that was generally available to parents of both public and private school students.[144] In upholding this program, the Court applied the three-pronged *Lemon* test and determined that the statute had a secular purpose, did not have the impermissible effect of advancing religion, and did not create excessive entanglement.[145] The Court also found that a tax deduction was not comparable to the tuition reimbursement program struck down in *Nyquist*, but rather closely resembled the neutral, generally applicable programs the Court had upheld.[146] Specifically, the Court analogized the *Mueller* program to those in *Everson*[147] and *Allen*[148] where "the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools," and "public assistance [was] available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited."[149] Parents had no additional incentives to choose private school over public school, and therefore the private choices of individual parents dictated how the aid was allotted.[150]

Following the *Mueller* rationale, in *Witters v. Washington Department of Services for the Blind*[151] the Court upheld a vocational rehabilitation program which provided benefits directly to qualifying individuals, regardless of the nature of the institution benefited.[152] Specifically, the Court found that the Establishment Clause did not prohibit the state from funding a blind student under a vocational rehabilitation assistance program who chose to pursue a degree in

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the practice of their religion"); *see also id.* at 249-50 (Harlan, J., concurring) (emphasizing the importance of government neutrality towards religion).

141. *Id.* at 245; *see supra* text accompanying notes 29-30, 135-38.

142. 463 U.S. 388 (1983).

143. According to the Court, "Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children." *Id.* at 390 (citing Minn. Stat. § 290.09(22) (1982) (repealed 1988)).

144. *See infra* text accompanying notes 285-88.

145. *Mueller*, 463 U.S. at 394-96; *see supra* notes 49-50 (discussing the *Lemon* test).

146. *Id.* at 394, 398.

147. *See supra* Part I.B.1.

148. *See supra* Part I.B.2.

149. *Mueller*, 463 U.S. at 398 (citations and footnote omitted).

150. *Id.* at 399.

151. 474 U.S. 481 (1986).

152. *See infra* text accompanying notes 290-91.

bible studies at a Christian college.[153] The Court focused on the genuine and independent choices of the private individual which ultimately determined whether the aid reached a religious institution.[154] Moreover, the program created no financial incentives to choose sectarian education and provided no greater benefits to those who did elect to pursue a religious education.[155] The Court took all of these factors into account in concluding that a neutral, generally applicable program of genuine private choice did not constitute an impermissible advancement of religion.[156]

In *Zobrest v. Catalina Foothills School District*,[157] independent choice was also a determining factor in the Court's assessment of the permissibility of a state program providing sign-language interpreters to students attending parochial schools.[158] In *Zobrest*, a deaf student attending a Catholic high school requested that the school district provide him with a sign-language interpreter under the Individuals with Disabilities Education Act ("IDEA").[159] Relying explicitly on *Mueller* and *Witters*, the Court found that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[160] Because the aid recipient independently chose to attend a religious school and the interpreter only entered that school as a result of the private decision of the student and his parents, the Court upheld the program.[161] Moreover, the program did not create an incentive to choose religious over public education, and the primary beneficiary of the aid was the student, not the religious institution.[162]

In decisions from *Everson* to *Zobrest*, the Court upheld only programs that provided a neutral and generally available benefit to all students regardless of the type of school they attended. In contrast, programs providing any form of direct aid or a financial incentive to choose sectarian education were consistently struck down.[163] However, after *Zobrest*, the Court began to shift away from its position of "no direct aid" to sectarian institutions toward a broader

153. *Witters*, 474 U.S. at 489-90.

154. *Id.* at 487 (finding that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").

155. *Id.* at 487-88.

156. *Id.* at 489-90.

157. 509 U.S. 1 (1993).

158. *Id.* at 10-11; *see also infra* notes 296-300 and accompanying text.

159. *Zobrest*, 509 U.S. at 3; 20 U.S.C. §§ 1400-91 (2000). The Arizona counterpart of the IDEA is codified at Ariz. Rev. Stat. Ann. § 15-761 to -774 (West 2002).

160. *Zobrest*, 509 U.S. at 8.

161. *Id.* at 10-11.

162. *Id.*

163. *See infra* note 422 and accompanying text.

view permitting state aid to church-related schools in certain instances.

C. Agostini *& Beyond: The Shift in the Court's Establishment Clause Jurisprudence*

The 1997 decision of *Agostini v. Felton*[164] marked a dramatic shift in the Court's school aid jurisprudence.[165] In that case, the Court overruled its 1985 *Aguilar v. Felton* decision[166] by upholding a federally funded program allowing public schoolteachers to provide remedial assistance in parochial school classrooms.[167] As seen in Parts II.A and II.B, prior to *Agostini*, the Court had consistently struck down school aid programs that gave substantial assistance to private, religious schools and that created incentives to choose sectarian over public education.[168] In *Lemon*, *Nyquist*, *Meek*, and *Wolman*, the Court found impermissible any aid that substantially benefited religious schools in the form of teachers' salaries, tuition reimbursements, and educational equipment that was potentially divertible to sectarian uses.[169] The Court in *Aguilar v. Felton* struck down a New York program which sent public school teachers into sectarian schools to provide remedial services for the students.[170] As in *Lemon* and *Meek*, the *Aguilar* Court reasoned that the program was impermissible because it created an excessive entanglement of church and state.[171] Until *Agostini*, the Court had upheld aid programs only if they provided neutral, generally available benefits, such as transportation, textbooks, and tax deductions.[172]

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164. 521 U.S. 203 (1997).

165. See *supra* Parts I.A and I.B for a discussion of the Court's school aid jurisprudence preceding *Agostini*.

166. 473 U.S. 402 (1985) (holding that the Establishment Clause prohibited New York's program which required sending public school teachers into parochial schools to provide disadvantaged children with remedial education).

167. *Agostini*, 521 U.S. at 234-35 (holding that New York's program funded under 20 U.S.C. § 6301 does not violate the Establishment Clause).

168. *See infra* notes 169-72 and accompanying text.

169. *See* Wolman v. Walter, 433 U.S. 229, 250 (1977) (holding that the loan of "neutral and secular instructional material and equipment . . . inescapably had the primary effect of providing a direct and substantial advancement of the sectarian education"); Meek v. Pittenger, 421 U.S. 349, 366 (1975) (holding that state aid in the form of instructional materials to sectarian schools "has the impermissible primary effect of advancing religion"); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that tuition reimbursements provided only to parents of private school students violate the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that state subsidization of sectarian teachers' salaries is impermissible); *see also supra* notes 29-30 and accompanying text.

170. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

171. *Aguilar*, 473 U.S. at 412-13.

172. *See* Mueller v. Allen, 463 U.S. 388 (1983); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947); *see also supra* notes 121-50 and accompanying text.

1. *Agostini*: Neutral, Indirect, and Supplemental Aid Is Permissible

In *Agostini*, the Court relied on post-*Aguilar* cases in reshaping and narrowing its understanding of the types of aid to religious schools that had the impermissible effect of advancing or inhibiting religion.[173] Between 1985 and 1997, the Court "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[174] Additionally, the Court departed from its previous rule that "all government aid that directly assists the educational function of religious schools is invalid."[175] These intervening changes in the Court's approach to programs granting aid to religious schools, manifested in *Zobrest* and *Witters*, among others, effectively required the Court to overrule its *Aguilar* decision.[176]

In upholding a federally sponsored program sending New York City public schoolteachers into sectarian schools to offer remedial assistance, the *Agostini* Court noted the importance of safeguards guaranteeing the use of public funds for purely secular purposes.[177] The program in *Agostini* contained rigid rules for teachers entering the sectarian schools to assure that religion remained outside the classroom.[178] The Title I statute authorizing the *Agostini* program explicitly commanded that the federally funded services must "supplement, and in no case supplant" the services available to private school students.[179] The *Agostini* program's services supplemented the basic education offered in sectarian schools, as opposed to the programs that the Court struck down because they funded basic

173. *Agostini*, 521 U.S. at 222-28. Justice O'Connor stated that "[o]ur more recent cases have undermined the assumptions upon which . . . *Aguilar* relied." *Id.* at 222.

174. *Id.* at 223 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), as a departure from the previously held view of the impermissibility of public employees in religious schools).

175. *Id.* at 225 (citing Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986), in which the Court abandoned the notion that any aid to religious schools is necessarily impermissible).

176. *Id.* at 222-30.

177. *Id.* at 234-35.

178. *Id.* at 211-12. Before public employees could offer remedial services in private schools, they were instructed that:

> (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only [eligible] children . . . ; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools.

Id. at 211 (citing Aguilar v. Felton, 473 U.S. 402, 406 (1985)).

179. *Id.* at 210 (quoting 34 C.F.R. § 200.12(a) (1996)).

education in *Lemon*-type sectarian schools.[180] In addition, funds from the *Agostini* program never "reach[ed] the coffers of religious schools"[181] and were not provided to religious schools generally; rather, eligible students received program benefits on an individual basis.[182]

The program further safeguarded the benefits from divertibility to religious uses by requiring that the local educational agencies that distribute services directly to the students "retain complete control over Title I funds . . . [and] all materials used to provide Title I services."[183] In overruling its decision in *Aguilar*, the Court found that New York's program allotted benefits on a religiously neutral basis and had sufficient safeguards to prevent government indoctrination.[184] In addition, Justice O'Connor's opinion rephrased the three-pronged *Lemon* test, thereby altering the approach the Court took in assessing the permissibility of government actions under the Establishment Clause.[185]

2. *Mitchell*: Neutral, Private Choice Programs Are Permissible

Following the impetus of *Agostini*, six Justices in 2000 voted to uphold the constitutionality of a program providing aid to both public and sectarian schools in the form of educational equipment, including books and computers.[186] In *Mitchell v. Helms*, the Court analogized Chapter 2 of the Education Consolidation and Improvement Act of 1981[187] to Title I of the Elementary and Secondary Education Act, which the Court upheld in *Agostini*.[188] Functioning similarly to the Title I program in *Agostini*, Chapter 2 "channel[ed] federal funds to local educational agencies ("LEA's"), which [we]re usually public school districts, via state educational agencies ("SEA's"), to implement programs to assist children in elementary and secondary schools."[189] Chapter 2 aid was provided for the "acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference

180. *See generally* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

181. *Agostini*, 521 U.S. at 228.

182. 34 C.F.R. § 200.12(b) (2001); *Agostini*, 521 U.S. at 228-29.

183. 20 U.S.C. § 6321(c)(1); *Agostini*, 521 U.S. at 210.

184. The Court held that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." *Agostini*, 521 U.S. at 234-35.

185. *Id.* at 234; *see infra* notes 323-25 and accompanying text.

186. Mitchell v. Helms, 530 U.S. 793 (2000).

187. 20 U.S.C. §§ 7301-73 (2000).

188. *Mitchell*, 530 U.S. at 801-02; *Agostini*, 521 U.S. at 230.

189. *Mitchell*, 530 U.S. at 801-02.

materials, computer software and hardware for instructional use, and other curricular materials."[190]

The *Mitchell* plurality[191] relied on the *Agostini*-modified *Lemon* test which restated the primary criteria the Court used in Establishment Clause challenges to "evaluate whether government aid has the effect of advancing religion."[192] Since *Agostini*, the Court has considered whether a given program "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement" between church and state.[193] The Court evaluated Chapter 2 under only the first two prongs of the test, finding that excessive entanglement was not at issue because the Fifth Circuit's holding on that question had not been challenged.[194] The *Mitchell* plurality found that there was no debate as to the secular purpose of the program and concluded that Chapter 2 was "not a 'law respecting an establishment of religion'" because the program "neither result[ed] in religious indoctrination by the government nor define[d] its recipients by reference to religion."[195] The *Mitchell* Court also overturned the *Meek*[196] and *Wolman*[197] decisions concluding that they were "anomalies in our case law."[198]

In upholding the Chapter 2 program, the *Mitchell* plurality relied on the precedents established in *Agostini*, *Zobrest*, *Witters*, and *Mueller*.[199] In each of these cases, the neutral availability of program benefits and the private choice afforded to individual beneficiaries greatly contributed to the permissibility of the programs under the Establishment Clause.[200] Similarly, the *Mitchell* Court found that the Chapter 2 aid was "allocated on the basis of neutral, secular criteria that neither favor[ed] nor disfavor[ed] religion, and [was] made available to both religious and secular beneficiaries on a nondiscriminatory basis."[201] Moreover, because the aid was allotted to each school on the basis of enrollment, the independent and private decisions of parents determined how much money was provided to private schools.[202] Parents had no incentive to choose sectarian

190. *Id.* at 802 (quoting 20 U.S.C. § 7351(b)(2) (2000)).
191. *Mitchell*, 530 U.S. at 801 (Thomas, J., announcing judgment of the Court, joined by Rehnquist, C.J. & Scalia & Kennedy, JJ.); *id.* at 836 (O'Connor, J., joined by Breyer, J., concurring).
192. *Mitchell*, 530 U.S. at 808 (quoting *Agostini*, 521 U.S. at 234).
193. *Id.* (quoting *Agostini*, 521 U.S. at 234).
194. *Id.*
195. *Id.*
196. Meek v. Pittenger, 421 U.S. 349 (1975); *see supra* notes 77-90 and accompanying text.
197. Wolman v. Walter, 433 U.S. 229 (1977); *see supra* notes 91-116.
198. *Mitchell*, 530 U.S. at 808.
199. *Id.* at 810-11; *see supra* notes 142-83.
200. *Mitchell*, 530 U.S. at 810-14.
201. *Id.* at 829 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).
202. *Id.* at 830.

education over public school because "[t]he aid follow[ed] the child."[203]

Justice O'Connor's concurring opinion, joined by Justice Breyer, criticized the plurality's reliance on the neutrality of the aid as the most important factor in evaluating constitutionality.[204] Instead, O'Connor relied solely on the criteria outlined in *Agostini*.[205] The *Mitchell* program, like that in *Agostini*, benefited all schoolchildren attending both private and public schools, and provided aid that was supplemental in nature, thereby justifying Justice O'Connor's reliance on the revised *Lemon* criteria.[206]

The concurrence emphasized the importance of safeguards in school aid programs to prevent the diversion of aid to religious purposes.[207] Justice O'Connor concluded that the program in *Mitchell* contained safeguards sufficient to prevent the government from providing "direct monetary payments to religious organizations."[208] The statute itself contained numerous limitations which served to ensure that the aid was used for only secular purposes.[209] The statute specified that aid was limited to "secular, neutral, and nonideological services, materials, and equipment,"[210] required that the aid only supplement and not supplant funds from non-Federal sources,[211] and prohibited "any payment . . . for religious worship or instruction."[212] Additionally, all private schools had to sign assurances that the aid received pursuant to Chapter 2 would only supplement, not supplant, non-Federal funds and would "only be used for secular, neutral and nonideological purposes."[213] Locally, the Jefferson Parish Public School System ("JPPSS") had to approve all aid to nonpublic schools

203. *Id.*

204. *Id.* at 837 (O'Connor, J., joined by Breyer, J., concurring). Justice O'Connor contended that "[t]he plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs." *Id.*

205. *Id.* The concurrence disagreed with the plurality's "rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs." *Id.* Justice O'Connor argued that "the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content." *Id.* Rather than accept the plurality's overbroad rule, O'Connor stated: "I believe that *Agostini* likewise controls the constitutional inquiry respecting Title II presented here." *Id.*

206. *Id.* at 844-49.

207. *Id.* at 860-66.

208. *Id.* at 843-44. According to the concurrence, "[t]he safeguards employed by the program [we]re constitutionally sufficient" to prevent the diversion of these funds to non-secular uses. *Id.* at 861.

209. *See generally* 20 U.S.C. §§ 7301-7373 (2000).

210. *Id.* § 7372(a)(1).

211. *Id.* § 7371(b).

212. *Id.* § 8897; *Mitchell*, 530 U.S. at 861.

213. *Mitchell*, 530 U.S. at 861-62 (citations omitted). The private schools then had to submit the assurances to the State department of education. *Id.* at 862.

and required that the school submit an application for Chapter 2 funds specifically detailing the purpose for which the funds were needed.[214] The JPPSS then annually monitored the private schools to ensure that any state aid provided under Chapter 2 was being used for an approved secular purpose.[215]

The plurality, as well as Justice Souter in his dissent, found that the safeguards in the Chapter 2 program were insufficient because they relied on religious school officials themselves to monitor the use of the aid.[216] However, the plurality also argued that "the evidence of actual diversion and the weakness of the safeguards against actual diversion [we]re not relevant to the constitutional inquiry."[217] Although believing that the safeguards were relevant to the Establishment Clause question, Justice O'Connor found that, regardless of whether safeguards were constitutionally required, Chapter 2 contained adequate safeguards to pass constitutional muster.[218] The Court upheld the Chapter 2 program in *Mitchell*, which was strikingly similar to the *Agostini* program, because the aid was neutrally available to all students and was supplemental to the educational function of sectarian schools.

Mitchell v. Helms was the last case to deal with school aid programs and Establishment Clause challenges until *Zelman v. Simmons-Harris* arose in 2002. The *Mitchell* decision expanded the definition of permissible aid and, in so doing, paved the way for the continuing shift that came in *Zelman*.

II. *ZELMAN V. SIMMONS-HARRIS*: THE ESTABLISHMENT CLAUSE PERMITS DIRECT, UNRESTRICTED AID TO SECTARIAN SCHOOLS

The Court's decision in *Zelman v. Simmons-Harris* is surprising given its previous school aid decisions. In order to uphold the Cleveland voucher program, the Court had to reject significant principles from its prior Establishment Clause decisions in *Zelman*.[219] This part focuses on the details of the Ohio voucher program that provided the basis for the Supreme Court's decision. It also explores

214. *Id.* at 862-63.
215. *Id.* at 863.
216. *Id.* at 863 (O'Connor, J., concurring); *id.* at 832 n.14 (plurality opinion).
217. *Id.* at 834.
218. *Id.* at 867 (O'Connor, J., concurring). The concurrence found that Chapter 2 is similar to *Agostini* because

> aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no Chapter 2 funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis;* and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion.

Id.; *see also supra* note 208 and accompanying text.
219. *See infra* Part III.A.2.

the lower courts' treatment of the voucher program which highlights by contrast the Court's ultimate decision in *Zelman*. Finally, this part discusses the Court's unprecedented decision and analyzes the differences between *Zelman* and prior decisions on similar facts.

A. *The Cleveland Voucher Program*

The Supreme Court's decision[220] upholding the Ohio Pilot Project Scholarship Program[221] was a response to Ohio's enactment of the 1995 voucher program which was designed to provide the students in the Cleveland City School District with a wider range of educational options.[222] Over 75,000 children were enrolled in the Cleveland School District, with an overwhelming majority of students coming from low-income and minority families.[223] For financial reasons, most of these families had no choice but to send their children to inner-city public schools which consistently failed to meet the students' educational needs.[224] In fact, the district was performing so far below the State's educational standards that in 1995, a federal district court declared that the school district was faced with a "crisis of magnitude,"[225] and put the State Superintendent of Public Instruction in charge of the entire Cleveland school district.[226]

In response to this desperate situation, the Ohio General Assembly created the controversial school voucher program to assist those low-income families residing in the Cleveland School District.[227] The Pilot Project Scholarship Program encompasses two different educational assistance programs: the first provides kindergarten through eighth-grade students with tuition assistance to attend any participating public or private school, including sectarian schools, while the second

220. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).
221. Ohio Rev. Code Ann. § 3313.974-.979 (Anderson 2002).
222. *Zelman*, 122 S. Ct. at 2462.
223. *Id.* at 2463.
224. *Id.*
225. *Id.* The Court further expounded upon the "crisis":

> The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

Id.
226. Simmons-Harris v. Zelman, 234 F.3d 945, 948 (6th Cir. 2000).
227. *Zelman*, 122 S. Ct. at 2463. Although the Ohio statute states that assistance is available in any Ohio school district "under federal court order requiring supervision and operational management of the district by the state superintendent," the Court noted that Cleveland is the only Ohio school district to meet the statutory criteria. *Id.* (quoting Ohio Rev. Code § 3313.975(A)).

offers tutoring to students remaining in the public schools.[228] This Comment focuses primarily on the former as it was the constitutionality of the tuition assistance program which was at question in *Zelman v. Simmons-Harris*.[229]

The Cleveland program made tuition assistance grants available to students attending any school participating in the program, regardless of the religious or secular affiliation of the institution.[230] To participate in the voucher program, the school needed only to be located within the Cleveland School District and to follow state educational guidelines. Additionally, private schools could not discriminate or "teach hatred of any person or group"[231] on the basis of race, religion, or ethnic background.[232] Although public schools in surrounding districts were eligible to receive voucher funds of $2,250 in addition to the state funds[233] received for each student,[234] there had been no public schools participating in the program since its inception.[235]

Because the goal of the legislature in enacting the voucher program was to improve the educational options open to students in the inner-city public schools, primarily those who were financially unable to attend another school, financial need was the principal criterion in the allocation of voucher funds.[236] Priority was given to low-income families[237] who were eligible to receive 90% of private school tuition up to $2,500,[238] and private schools could charge parents no more than $250 in tuition co-payments.[239] The program first granted funds to low-income families and then distributed any remaining scholarships to other families within the Cleveland district.[240] In the 1999-2000

228. *Id.*
229. *See id.*
230. *Id.*
231. Ohio Rev. Code Ann. § 3313.976(A)(6).
232. *Zelman*, 122 S. Ct. at 2463.
233. Each year, "the Cleveland public school district spends an average of $7,097 for each student enrolled in its schools, including its magnet schools. The State of Ohio provides $4,167 of this $7,097." Affidavit of Caroline M. Hoxby, App. N, J.A. at 56a, *Zelman*, 122 S. Ct. 2460 (No. 00-1751, 00-1777, 00-1779). When the numbers are viewed in this light, "the State of Ohio provides more per pupil to the Cleveland public school district and to community schools than it provides to The Cleveland Scholarship Program." *Id.*
234. *Zelman*, 122 S. Ct. at 2463.
235. *Id.* at 2464. No public schools have ever participated in the voucher program, and information concerning the 1999-2000 school year indicated that public schools were still not involved. *Id.*
236. *Id.*
237. *Id.* (defining low-income families as those with "incomes below 200% of the poverty line").
238. Ohio Rev. Code § 3313.978(A), (C)(1) (2002).
239. *Id.* § 3313.976(A)(8).
240. *Zelman*, 122 S. Ct. at 2464 & n.2; *see also* Affidavit of Kim Metcalf, App. O, J.A. at 69a, *Zelman*, 122 S. Ct. 2460 (No. 00-1751, 00-1777, 00-1779) (stating that "73.4% of the scholarship families are non-white . . . 60% of the non-white families

school year, 60% of voucher recipients fell into the low-income category.[241] All other families received assistance of 75% of the tuition, up to a maximum of $1,875, and the program placed no limit on the amount of parental co-payment.[242] The state sent the program funds directly to the private schools, but the checks were made out to the parents, who then had to endorse the voucher funds over to the school in order to pay their child's tuition.[243]

Since the voucher program's inception within the Cleveland City School District during the 1996-97 school year, no public schools have participated.[244] The overwhelming number of private schools[245] accepting scholarship recipients are *Lemon*-type sectarian schools,[246] in which religious doctrine pervades the curriculum and all aspects of the educational experience. In 1999-2000, the voucher program provided scholarships to over 3,700 students, an astounding 96% of whom used the money to attend private religious schools.[247]

In addition to the voucher program that gave students vouchers to attend participating private schools, the Ohio Program offered community schools[248] and magnet schools[249] as alternatives to the inner-city public schools. Parents eligible to receive voucher funds could either enroll their children in a participating private school or elect to send their children to a magnet school or community school.[250] During the 1999-2000 school year, ten community schools were

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are African-American . . . [and] 70% of the households of scholarship families are headed by a single mother and the mean family income is $18,750.00").

241. *Zelman*, 122 S. Ct. at 2464.

242. *Id.* (citing Ohio Rev. Code Ann. §§ 3313.976(A)(8), 3313.978(A)).

243. Ohio Rev. Code Ann. § 3313.979.

244. *See supra* note 235 and accompanying text.

245. Fifty-six private schools participated during the 1999-2000 school year and, of those, 82% are religiously affiliated. *Zelman*, 122 S. Ct. at 2464.

246. *See supra* notes 52-55 and accompanying text (discussing the *Lemon* profile of sectarian schools).

247. *Zelman*, 122 S. Ct. at 2464. The Indiana Center for Evaluation interviewed Cleveland parents about why they participated in the scholarship program since participation essentially meant choosing a private religious school over public education. The most significant results were: 96.4% of parents indicated that their decision was largely based on the belief that "their private schools offered a better education than the public"; 84.6% believed that the public schools provided a "low quality education"; 78% did not like the Cleveland public schools; 95% were concerned about their child's safety; and 88.7% stated that financial considerations strongly influenced their application for a scholarship. Affidavit of Kim Metcalf, App. O, J.A. at 69a-70a, *Zelman*, 122 S. Ct. 2460 (No. 00-1751, 00-1777, 00-1779). Essentially, "[t]he scholarship was the only way they could send their child to a private school." *Id.*

248. *Zelman*, 122 S. Ct. at 2464 (defining community schools as those "funded under state law but . . . run by their own school boards" which are free to "hire their own teachers and to determine their own curriculum").

249. *Id.* at 2464-65 (defining magnet schools as "public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students").

250. *Id.* at 2469.

created within the Cleveland School District as well as twenty-three magnet schools.[251] The existence of these other alternatives to private, sectarian education was central to the Court's decision in *Zelman*.[252] If the Court had not taken all of the parents' options into account, the Court would have had to assess only the constitutionality of the state's spending over $8 million a year on sectarian schools. However, when all the educational alternatives were taken into consideration, the $8.2 million annual state expenditure on the voucher program, comprised of predominantly sectarian schools, represented only 6% of Ohio's total educational expenditures.[253]

B. *Lower Court Treatment*

The Cleveland voucher program faced immediate opposition, and a group of Ohio taxpayers sued the State of Ohio and the State Superintendent of Schools in January 1996, in Ohio state court, challenging the constitutionality of the voucher program under the Establishment Clause and the Ohio state constitution.[254] The Ohio state court upheld the voucher program as constitutional, and the Ohio Court of Appeals reversed the decision.[255] Hearing the case on appeal, the Ohio Supreme Court invalidated the voucher program, finding that the enactment of the program, not the program itself, violated the Ohio Constitution.[256] The Ohio legislature revised the statute to comply with Ohio's constitutional requirements, without altering the substance of the voucher program, and reenacted the program into law in June 1999.[257]

In July 1999, the same group of taxpayers filed suit in the Northern District of Ohio, challenging the Cleveland program solely on the ground that it violated the Establishment Clause.[258] The district court initially granted a preliminary injunction against the voucher portion

251. *Id.* at 2464-65. Over 1900 students were enrolled in community schools and over 13,000 students were enrolled in magnet schools. *Id.*

252. *Id.*

253. *Id.* at 2473-74 (O'Connor, J., concurring); *id.* at 2493 (Souter, J., dissenting) (disagreeing with the majority's "pick and choose" approach in considering which educational alternatives to compare with the scholarship program). Justice Souter believed this comparison was underhanded because "[i]f the choice of relevant alternatives is an open one, proponents of voucher aid will always win, because they will always be able to find a 'choice' somewhere that will show the bulk of public spending to be secular." *Id.* Essentially, the Court's selection of alternatives that are considered as choices in the analysis will always determine the outcome. *Id.*

254. Brief of State Petitioners at 11, *Zelman* (No. 00-1751, 00-1777, 00-1779).

255. *Id.*

256. Simmons-Harris v. Goff, 711 N.E.2d 203, 216 (Ohio 1999) (finding that the creation of a substantive program in a general appropriations bill violates the "one-subject rule" of the Ohio Constitution).

257. Petitioners' Brief at 11, *Zelman* (No. 00-1751, 00-1777, 00-1779).

258. *Id.* at 11-12.

of the program,[259] which was stayed by the Supreme Court pending review by the Court of Appeals.[260] The district court granted summary judgment for the taxpayers and enjoined scholarship distribution by the program.[261]

On appeal, the Sixth Circuit affirmed the district court's holding that the program "has the primary effect of advancing religion, and . . . constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause."[262] In reaching this conclusion, the Sixth Circuit emphasized that, although the defendants urged the court to consider all the educational options available to Cleveland schoolchildren, including the community and magnet schools, the court was unable to do so because the voucher program and the other programs were set forth in separate sections of the Ohio code.[263]

Employing the *Lemon* test to assess the constitutionality of Ohio's program,[264] the Sixth Circuit found that "[t]he voucher program at issue constitute[d] the type of 'direct monetary subsidies to religious institutions,' that Justice O'Connor found impermissible in *Mitchell*" and that had the effect of advancing religion.[265] The Sixth Circuit found that *Nyquist* was the controlling case on the facts of the Ohio program, and, in accordance with *Nyquist*, the court invalidated the voucher program.[266] The Sixth Circuit opinion also followed the *Lemon* precedent in noting its inability to consider the magnet and community schools as alternatives because they were not part of the Ohio Voucher Program in question.[267] The Supreme Court granted certiorari[268] and, on June 27, 2002, handed down a decision viewed as

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259. Simmons-Harris v. Zelman, 54 F. Supp. 2d 725, 741-42 (N.D. Ohio 1999). The district court held that the Ohio program should be enjoined because

> Plaintiffs have a very substantial chance of succeeding on the merits. . . . Parents cannot make an educational choice without regard to whether the school is parochial or not. Consequently, the Cleveland Program has the primary effect of advancing religion. Failing to grant the injunction under such circumstances . . . could cause an even greater harm to the children by setting them up for greater disruption at a later time.

Id.

260. Zelman v. Simmons-Harris, 528 U.S. 983 (1999).

261. Simmons-Harris v. Zelman, 72 F. Supp. 2d 834, 865 (N.D. Ohio 1999).

262. Simmons-Harris v. Zelman, 234 F.3d 945, 961 (6th Cir. 2000), *cert. granted*, 533 U.S. 976 (2001). *See generally* Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DePaul L. Rev. 997, 1004 (2002) (discussing the "defects of the reasoning employed by" the Sixth Circuit).

263. *Simmons-Harris*, 234 F.3d at 958; *see infra* notes 267-68, 328-29 and accompanying text.

264. *Simmons-Harris*, 234 F.3d at 952-54.

265. *Id.* at 960 (citations omitted).

266. *Id.* at 958-59, 961.

267. *Id.* at 958 (noting that because the Community Schools program is codified in a separate part of the Ohio Revised Code and does not refer to the voucher program, the court will not view the two programs as interdependent).

268. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 533 U.S. 976 (2001).

a watershed by school voucher proponents nationwide.[269]

C. *The Supreme Court Decision*

The ruling in *Zelman v. Simmons-Harris*[270] departs from the Supreme Court's prior treatment of Establishment Clause challenges to programs directing public funds to private, religious institutions.[271] Specifically, the Court rejected the firmly rooted idea that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole."[272] In addition, the Court refused to accept that because it is impossible to "separat[e] the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[273] Moreover, the Court did not follow the traditional analysis used in school aid cases,[274] but rather created new criteria for assessing the constitutionality of such programs.[275]

1. The Majority Opinion

While the Court did not explicitly refer to *Lemon*, the majority briefly addressed the *Lemon* test's criteria. After concluding that the Ohio program was "enacted for the valid secular purpose of providing educational assistance to poor children"[276] in the failed Cleveland public school system, the *Zelman* Court assessed whether the Ohio program had the effect of advancing or inhibiting religion.[277]

Chief Justice Rehnquist, writing for the Court, began his analysis of the Ohio program by differentiating those impermissible programs that provide direct aid to religious schools from those in which the private choices of individuals dictate whether, and how much, aid reaches religious schools.[278] The Court held that the Cleveland school voucher program fell into the latter category of "neutral government

269. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002); *see supra* note 17 and accompanying text.

270. 122 S. Ct. 2460.

271. *See supra* Part I.A.

272. Meek v. Pittenger, 421 U.S. 349, 366 (1975); *see supra* note 86 and accompanying text.

273. Wolman v. Walter, 433 U.S. 229, 250 (1977); *see supra* note 112 and accompanying text.

274. *See infra* Part III.A.2.

275. *See infra* notes 305-07 and accompanying text.

276. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2465 (2002).

277. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 222-23 (1997)). The *Agostini* Court explained that the criteria used to evaluate Establishment Clause challenges to government aid programs remain unchanged since *Aguilar*. *Agostini*, 521 U.S. at 222-23. The Court asked "whether the government acted with the purpose of advancing or inhibiting religion," and "whether the aid has the 'effect' of advancing or inhibiting religion." *Id.*

278. *Zelman*, 122 S. Ct. at 2465.

programs that provide aid directly to a broad class of individuals."[279] According to the Court, any aid that the Cleveland program conferred on religious institutions was a consequence only of the "genuine and independent choices of private individuals."[280] The Court analogized the Ohio program to the "true private choice" programs[281] deemed permissible in *Mueller*,[282] *Witters*,[283] and *Zobrest*.[284]

In *Mueller*, the Court upheld a Minnesota program allowing tax deductions for tuition and other educational expenses, finding it significant that the program "permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses."[285] The Court emphasized that the program provided a neutrally available public benefit,[286] which created no incentives for parents to choose a religious school.[287] Essentially, the "numerous private choices of individual parents" determined whether any public funds ultimately reached sectarian schools.[288] In keeping with the *Mueller* precedent, the *Zelman* Court found that the presence of private choice and the neutral availability of benefits to all parents in the district in the Ohio voucher program weighed heavily in favor of the program's constitutionality.[289]

Without mentioning the *Mueller* decision, the *Witters* Court employed the same private choice rationale, and upheld a Washington State vocational rehabilitation program that provided funds to a blind person who was attending a Christian college.[290] The *Zelman* Court articulated a rationale nearly identical to that of *Witters* for upholding the constitutionality of the Ohio voucher program.[291] In *Witters*, the program awarded grants directly to eligible individuals[292] and

279. *Id.* at 2466.
280. *Id.* at 2465.
281. *Id.* at 2467.
282. Mueller v. Allen, 463 U.S. 388 (1983) (upholding the constitutionality of a Minnesota program providing tax deductions for educational expenses to all parents, regardless of the type of school the child attended).
283. Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (upholding a vocational rehabilitation program which paid the tuition of a blind student at a religious school only because he freely chose to attend a religious school).
284. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (finding that the presence of a sign language interpreter in a sectarian school did not violate the Establishment Clause).
285. *Mueller*, 463 U.S. at 398.
286. *Id.* at 398-99.
287. *Id.* at 399.
288. *Id.*
289. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2467-68 (2002).
290. Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 483 (1986). Justice Powell wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, in order to "emphasize that *Mueller* strongly supports the result we reach today" and the *Witters* decision does not "lessen[] the authority" of the *Mueller* decision. *Id.* at 490-92 (Powell, J., joined by Burger, C.J. & Rehnquist, J., concurring).
291. *Zelman*, 122 S. Ct. at 2468.
292. *Witters*, 474 U.S. at 488.

consequently public funds reached the Christian college only because of the truly private choices of the individual beneficiary.[293] Additionally, the *Witters* program provided "no financial incentive for students to undertake sectarian education," and did not define recipients based on religious persuasion.[294] The *Zelman* Court analogized the independent choice in the Cleveland program to that of the *Witters* program in concluding that the voucher program was permissible.[295]

The majority also relied on the private choice rationale as construed in *Zobrest*. The *Zobrest* Court, following both *Mueller* and *Witters*, held that the Establishment Clause permitted the government to supply a sign-language interpreter to a deaf student attending a Catholic high school.[296] The Court deemed the provision of an interpreter under the Individuals with Disabilities Education Act[297] ("IDEA") to be a neutral government service available to all disabled students which did not result in government endorsement of sectarian education.[298] The Court concluded that Mr. Zobrest's decision to attend a Catholic high school was purely personal, and in no way government-induced, because the program provided an interpreter to eligible students regardless of the type of school attended.[299] Moreover, the presence of a government-employed interpreter in a sectarian school was held to result entirely from the private choices of individual parents and thus was permissible.[300]

In *Zelman*, Chief Justice Rehnquist disregarded the respondent's argument that the program created a "public perception" of government endorsement of religion,[301] finding that "no reasonable observer" could construe such a "neutral program of private choice" as an endorsement of religious education.[302] Despite the fact that the

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293. *Id.*

294. *Id.*

295. According to the Court, "[t]here are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools." *Zelman*, 122 S. Ct. at 2468 (citing *Witters*, 474 U.S. at 487-88). Furthermore, "[s]uch incentives '[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" *Id.* (citing Agostini v. Felton, 521 U.S. 203, 231 (1997)).

296. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993).

297. 20 U.S.C. § 1400 (2000).

298. *Zobrest*, 509 U.S. at 10.

299. *Id.*

300. *Id.* The Court stated that "[b]y according parents freedom to select a school of their choice, the [IDEA] statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.*

301. Brief for Respondents Doris Simmons-Harris, et al., at 37-38, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (No. 00-1751, 00-1777, 00-1779).

302. *Zelman*, 122 S. Ct. at 2468; *see* Gary J. Simson, *School Vouchers and the Constitution—Permissible, Impermissible, or Required?*, 11 Cornell J.L. & Pub. Pol'y 553, 569 (2002). Disagreeing with Chief Justice Rehnquist, Simson argued that "a

plaintiffs considered the program to be unconstitutional, the Court found that reasonable observers would view the voucher program only as a means of improving the educational opportunities of poor students trapped in a failing school district.[303]

After explaining the applicability of *Mueller*, *Witters*, and *Zobrest*, the *Zelman* Court then considered "whether Ohio [was] coercing parents into sending their children to religious schools."[304] The Court did so "by evaluating *all* options Ohio provides Cleveland schoolchildren."[305] In upholding the Ohio voucher program, the Court found it crucial that private sectarian schools were only one of the many options available to parents.[306] The choices included remaining in the failing public school system, using a voucher to attend a private religious or nonreligious school, or attending the newly created community or magnet schools.[307]

The Court rejected the respondents' argument that the State of Ohio was subsidizing religious education because 46 of the 56 schools participating were sectarian, and 96% of voucher recipients attended sectarian schools.[308] The number of sectarian schools participating in the program directly corresponded to the number of private religious schools in the State of Ohio.[309] Additionally, the Court followed *Mueller* in rejecting the argument that the high percentage of students attending religious schools necessarily implied a lack of genuine independent choice.[310] Citing *Agostini*, the Court added that the amount of benefits going to religious schools is not relevant in determining the constitutionality of a direct aid program such as Cleveland's voucher program.[311] While the amount of aid directed to sectarian schools may not be relevant to the constitutional inquiry, *Zelman* indicated that the presence of genuine choice is still a significant factor.[312]

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reasonable observer would view the Ohio program as one that inevitably would produce a highly disproportionate impact in favor of religion, and . . . would assume that the lawmakers who drafted and adopted the program could not help but know that the program would produce such an impact." *Id.* Moreover, "[u]nder the circumstances, a reasonable observer would be amply justified in perceiving the program as sending a message of government endorsement of religion." *Id.*

303. *Zelman*, 122 S. Ct. at 2469.

304. *Id.*

305. *Id.*

306. *Id.* at 2469, 2473.

307. *Id.* at 2469.

308. *Id.* at 2469-70.

309. *Id.* at 2470 ("It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools.").

310. *Id.* In *Mueller*, the Court "found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools." *Id.*

311. *Id.* (citing Agostini v. Felton, 521 U.S. 203, 229 (1997)).

312. If some public schools participated in the voucher program, but all the students elected to attend sectarian schools, the fact that all the aid funded religious

By considering all of the options available to Cleveland schoolchildren, the Court engaged in an analysis that differed substantially from that of the lower courts.[313] When the number of students attending community and magnet schools was included in the number of children benefiting from the Ohio Program, the percentage of children attending religious schools fell to less than 20% of program participants.[314] Because the Court altered its prior analysis of school aid programs to include all the possible educational alternatives, the Court avoided determining whether the choices available to Cleveland parents—sectarian schools or failing public schools—represented a "genuine choice." If the Court had assessed the program under its earlier analysis, it seems unlikely that the Court could justifiably have reached the same conclusion on the facts of *Zelman*.

Finally, the Court held that *Nyquist* "does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion."[315] The Court distinguished the *Nyquist* program, which provided tuition reimbursements only to parents of private school students, from the Ohio program, which granted neutral, generally available benefits to all parents.[316] It is important to note that the *Nyquist* Court considered only the benefit to religious schools resulting from the New York statutes in question; it did not further inquire into the educational options available to the children of New York.[317] Arguably, had the *Nyquist* Court evaluated New York's program in the same manner as the *Zelman* Court evaluated Ohio's, the outcome in *Nyquist* would have been drastically different. The Court presumably would have upheld the tuition reimbursements as long as parents had reasonable alternatives to sectarian education.[318]

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education would be irrelevant because the choice between alternatives would be genuine. When the choice is limited to sectarian school or failing public school, the Court might not consider the choice "genuine" and therefore, even though the amount of aid is not taken into account, the lack of choice will render the program impermissible. *See infra* Part III.B.

313. Simmons-Harris v. Zelman, 234 F.3d 945, 958 (6th Cir. 2000) (discussing the inability of the court to consider all the options available to Cleveland children, such as the Community Schools Program, due to the codification of the voucher program in its own chapter of the Ohio Code; to look beyond that chapter would require the court to evaluate all the educational options available in Cleveland); *see supra* notes 262-63 and accompanying text.

314. *Zelman*, 122 S. Ct. at 2470-71. These statistics are based on the number of students enrolled in "nontraditional schools" during the 1999-2000 school year. *Id.* at 2471.

315. *Id.* at 2472.

316. *Id.*

317. *See generally* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

318. The dissent in *Nyquist* points out that the majority failed to consider that "parents who are sending their children to nonpublic schools are rendering the State a

In *Zelman*, the Court relied on its precedents in concluding that the voucher program was constitutional because it met the criterion of "true private choice."[319] The Court outlined the features of the challenged program which reinforced the constitutionality of Ohio's educational initiative:

> [T]he Ohio program is neutral in all respects toward religion. It is part of a[n] . . . undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion . . . [and] permits the participation of *all* schools within the district, religious or nonreligious . . . . [B]enefits are available . . . on neutral terms . . . . The only preference . . . is a preference for low-income families . . . .
>
> There are no "financial incentive[s]" that "ske[w]" the program toward religious schools . . . . The program . . . creates financial *dis*incentives for religious schools . . . [and for families] to choose a private religious school over other schools . . . [because] [p]arents that . . . enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition.[320]

In upholding the constitutionality of the Ohio voucher program, the Court emphasized that it was "keeping with an unbroken line of decisions rejecting challenges to similar programs."[321]

2. The Concurring Opinions

Justice O'Connor wrote a concurring opinion in order to confirm that the *Zelman* decision did not "mark[] a dramatic break from the past."[322] Her reasoning thus highlights her view that the majority's analysis could well be interpreted as a departure from precedent.

Although the majority makes no mention of the *Lemon* test, which Justice O'Connor considered a "central tool in [the Court's] analysis of [Establishment Clause] cases," she concluded that the Court had applied a refined version of the test.[323] Because the Ohio program distributed aid to individual beneficiaries rather than to the religious schools, the Establishment Clause question became whether such an

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service by decreasing the costs of public education . . . . Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education." *Id.* at 812 (Rehnquist, J., dissenting in part). In reality, through this program "New York is effectuating the secular purpose of the equalization of the costs of educating New York children that are borne by parents who send their children to nonpublic schools." *Id.*

319. *Zelman*, 122 S. Ct. at 2467 (finding the Ohio program permissible by relying on *Mueller*, *Witters*, and *Zobrest*); *see supra* notes 278-300 and accompanying text.

320. *Zelman*, 122 S. Ct. at 2467-68 (citations omitted).

321. *Id.* at 2473.

322. *Id.* (O'Connor, J., concurring).

323. *Id.* at 2476 (O'Connor, J., concurring).

indirect aid program had the primary effect of "endors[ing] or disapprov[ing] . . . religion."[324] Justice O'Connor stated that the primary factors for future courts to consider are whether the program disperses aid neutrally and whether aid recipients have a genuine choice with regard to religious or nonreligious organizations.[325]

In essence, Justice O'Connor conducted the *Lemon* analysis which the majority had failed to perform. She found that the program benefits were neutrally available to parents, thereby satisfying the first part of the inquiry.[326] In assessing the aspect of genuine choice, Justice O'Connor agreed with the majority that all the choices available to beneficiaries had to be considered, because examining only the program in question "ignore[d] how the educational system in Cleveland actually function[ed]."[327] Additionally, she stated that the Sixth Circuit acted erroneously when it refused to look at the other educational options.[328] O'Connor adopted the Court's approach of looking at all the alternatives available, and found the Ohio program to be one of true private choice in accordance with the Establishment Clause requirements.[329]

Justice Thomas's concurrence expressed his opinion that a decision striking down Ohio's voucher program would essentially mean "converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice."[330] The voucher program, in Thomas's view, served the important purpose of allowing states to deal with their own educational problems to ensure that no students received a sub-standard education.[331] Justice Thomas contended that it is imperative that states have such power to make reforms within their educational systems because "failing urban public schools disproportionately affect minority children."[332] If the Court were to forbid a state from improving the quality of its education, Thomas believes that the "core purposes" of the Fourteenth Amendment would be essentially

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324. *Id.* (O'Connor, J., concurring) (citing Lynch v. Donnelly, 465 U.S. 668, 691-92 (1984)).

325. *Id.* (O'Connor, J., concurring).

326. *Id.* at 2476-77 (O'Connor, J., concurring).

327. *Id.* at 2478 (O'Connor, J., concurring).

328. *Id.* (O'Connor, J., concurring); *see supra* notes 263 and 267 and accompanying text.

329. *Zelman*, 122 S. Ct. at 2480 (O'Connor, J., concurring) (finding the reasoning of the Court "consistent with the realities of the Cleveland educational system").

330. *Id.* at 2482 (Thomas, J., concurring).

331. *Id.* at 2482-83 (Thomas, J., concurring) (stating that "the inclusion of religious schools makes sense given Ohio's purpose of increasing educational performance and opportunities, [and that] . . . the State has a constitutional right to experiment with a variety of different programs to promote educational opportunity").

332. *Id.* at 2483 (Thomas, J., concurring) (noting that "many blacks and other minorities now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities").

disregarded.[333]

3. The Dissenting Opinions

The four dissenting Justices in *Zelman* expressed their views in three separate opinions. All four dissenting Justices agreed that the conclusion reached by the *Zelman* majority, and the Cleveland voucher program which it consequently upheld, contravened the Establishment Clause.[334]

Justice Stevens argued that the three criteria considered most significant to the majority—genuine choice, availability of alternatives, and the educational crisis in Cleveland—should not have been part of the Court's constitutionality inquiry.[335] Justice Stevens dissented because he believed that the state payment of sectarian school tuition violated the Establishment Clause.[336] Stevens further argued that "[w]henever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[337] According to Stevens, this is exactly the problem that the majority's "profoundly misguided" decision created.[338]

Justice Souter's dissent (joined by Justices Stevens, Ginsburg and Breyer) argued that the majority essentially ignored the Court's Establishment Clause precedents.[339] In addition, the majority disregarded the Court's usual understanding of neutrality[340] and free choice[341] as criteria for assessing constitutionality.[342] In his opinion,

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333. *Id.* (Thomas, J., concurring). Justice Thomas asserted that the Fourteenth Amendment is properly construed as a "guarantee of opportunity," and any interpretation that reads the Fourteenth Amendment as a restriction on educational reform would be unfaithful to the Constitution. *Id.* at 2484 (Thomas, J., concurring).

334. *See generally* Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 Harv. L. Rev 163 (2002) (analyzing the four dissenting opinions in *Zelman*).

335. *Zelman*, 122 S. Ct. at 2484-85 (Stevens, J., dissenting).

336. *Id.* (Stevens, J., dissenting).

337. *Id.* at 2485 (Stevens, J., dissenting).

338. *Id.* (Stevens, J., dissenting).

339. *Id.* at 2486-90 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). Justice Souter, discussing the Court's departure from precedent, questioned the majority: "How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot." *Id.* at 2486 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). The majority cannot "claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law" without ignoring *Everson*. *Id.* (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) Justice Souter contended that "[i]t is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria." *Id.* (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

340. *Zelman*, 122 S. Ct. at 2490-92 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

341. *Zelman*, 122 S. Ct. at 2492-97 (Souter, J., dissenting). Justice Souter further explained the *Zelman* majority's misuse of the genuine choice criterion:

> If, contrary to the majority, we ask the right question about genuine choice

Justice Souter questioned the majority as to "how [the Court] should . . . decide which 'choices' are 'genuine' if the range of relevant choices is theoretically wide open?"[343] Souter argued that, if "every educational option is a relevant 'choice,' [then the] 'genuine and independent private choice' enquiry" seems to require the Court to assess the quality of each option.[344] Justice Souter asked the central question, namely "[W]hat does this enquiry have to do with the Establishment Clause?"[345] The majority did not directly respond to the dissent, and thus failed to provide answers to these crucial questions which will inevitably arise in future cases.[346] In conclusion, Justice Souter pleaded that "a future Court [would] reconsider today's dramatic departure from basic Establishment Clause principle" and return to the Court's school aid precedents.[347]

Justice Breyer also authored a dissenting opinion, joined by Justices Stevens and Souter, in order "to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict."[348] According to Justice Breyer, the Establishment Clause prohibits the type of voucher program enacted in Cleveland, and even the element of "parental choice" could not circumvent the constitutional prohibition.[349]

> to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999-2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones.

Id. at 2494 (Souter, J., dissenting).

342. *Zelman*, 122 S. Ct. at 2490-97 (Souter, J. dissenting). According to Justice Souter:

> [I]t was not until [the *Zelman* decision] that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools.

Id. at 2490 (Souter, J., dissenting); *see infra* notes 429-31 and accompanying text.

343. *Zelman*, 122 S. Ct. at 2494 n.10 (Souter, J., dissenting).

344. *Id.* (Souter, J., dissenting).

345. *Id.* (Souter, J., dissenting).

346. *See generally* Steven K. Green, *The Illusionary Aspect of "Private Choice" for Constitutional Analysis*, 38 Willamette L. Rev. 549, 561 (2002) (arguing that post-*Zelman*, "the legal impact of private choice remains illusive").

347. *Zelman*, 122 S. Ct. at 2502 (Souter, J., dissenting).

348. *Id.* (Breyer, J., joined by Stevens & Souter, JJ., dissenting). Justice Breyer also contended that the Court's Establishment Clause cases have been primarily motivated by the avoidance of religious strife:

> The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* . . . , but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

Id. at 2505 (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

349. *Id.* at 2507 (Breyer, J., joined by Stevens & Souter, JJ., dissenting). Justice Breyer stated: "I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the

Justice Breyer further criticized the majority for "turn[ing] the clock back."[350] In Breyer's view, the Court had "adopt[ed], under the name of 'neutrality,' an interpretation of the Establishment Clause that [it] rejected more than half a century ago."[351] In so doing, the Court created a great danger of increased religious divisiveness,[352] especially because the Cleveland program required state officials to monitor sectarian schools for compliance with the program standards.[353]

As the dissenting Justices all identified, the *Zelman* majority arrived at its judgment by taking an unconventional approach to Establishment Clause challenges involving public funding of religious institutions.[354] The emphasis placed on parental free choice, the availability of secular alternatives, and the educational crisis in Cleveland's public school districts is unprecedented. Part III examines the extent to which the Court actually departed from precedent in upholding Cleveland's school voucher program and the consequences of that departure for future cases.

III. *ZELMAN V. SIMMONS-HARRIS* REMOVED THE ESTABLISHMENT CLAUSE BAR TO SCHOOL VOUCHER PROGRAMS, BUT DID NOT RENDER ALL VOUCHER PROGRAMS CONSTITUTIONAL

Although the rule of *Zelman v. Simmons-Harris* is clear, its implications are considerably less evident. Section A considers the extent to which the *Zelman* Court departed from its Establishment Clause precedent, especially from the *Lemon* and *Nyquist* decisions[355] which were not expressly overruled. Section A also examines the characteristics of school aid programs that the Court considered significant in previous cases, and compares them to the Court's treatment of similar characteristics in *Zelman*. Section B analyzes the consequences of the *Zelman* decision and argues that, after *Zelman*, not all school voucher programs are permissible.

A. *Has the Supreme Court "Misapplied Its Own Law?"*

Is it true, as Justice Souter declared in the four-Justice dissent, that the *Zelman* majority has not only "misapplied its own law" but also has entered a judgment which is "profoundly at odds with the

implementation of this well-intentioned school voucher program." *Id.* at 2502 (Breyer, J., joined by Stevens & Souter, JJ., dissenting); *see also id.* at 2507-08 (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

350. *Id.* at 2508 (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

351. *Id.* (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

352. *Id.* (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

353. *Id.* at 2505-06 (Breyer, J., joined by Stevens & Souter, JJ., dissenting).

354. *See id.* at 2485-502 (Souter, J., dissenting).

355. See *supra* Parts I.A.1 and I.A.2 for background on the *Lemon* and *Nyquist* decisions.

Constitution"?[356] At first glance, it appears that the *Zelman* decision diverged from prior school aid decisions.[357] In cases from *Lemon* to *Aguilar*, the Supreme Court refused to uphold state-funded programs providing for the payment of sectarian teachers' salaries for the religious indoctrination of schoolchildren under the Establishment Clause.[358] Although the Court did shift in its treatment of aid to parochial schools in *Agostini*,[359] the Court's rationale in that case was not sufficiently broad to account for approving payment of sectarian teachers' salaries in *Zelman*.[360] The *Zelman* Court's analysis of the Cleveland voucher program took a different approach than in previous cases, and while the Court did not follow its many Establishment Clause precedents, it did not expressly overrule them, either. Therefore, when the decision is closely analyzed, it becomes clear that the Court has not "misapplied" its own law but rather has disregarded seemingly controlling precedents in creating a new method of analyzing school aid programs.

1. Is *Zelman* Inconsistent with *Lemon* and *Nyquist*?

On its face, *Zelman* gives the impression that the original *Lemon*

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356. *Zelman*, 122 S. Ct. at 2497 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). Justice Souter correctly stated that the Establishment Clause cannot be overlooked simply because the voucher program is necessary to provide alternatives to failing public schools. *Id.* at 2485 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). The dissent argued:

> The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these.

Id. (Souter, J., dissenting).

357. The majority opinion in *Zelman* makes no reference to the *Lemon* test and relies solely on the free choice afforded parents in selecting a school, the availability of secular alternatives, and the crisis in the Cleveland school district. See *infra* Part III.A.2 for a discussion of the factors the Court failed to consider in *Zelman*, yet found determinative in previous school aid cases.

358. *See generally* Aguliar v. Felton 473 U.S. 402 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also supra* Part I.A.

359. *See supra* Part I.C.1.

360. In *Agostini*, the Court upheld a program which sent public schoolteachers into sectarian schools to provide remedial assistance to disadvantaged students on the bases that the aid was supplemental and neutral, and that the program included safeguards to prevent religious indoctrination of the students. Agostini v. Felton, 521 U.S. 203 (1997).

test is obsolete in evaluating the permissibility of government aid programs under the Establishment Clause. Without referring to *Lemon*, the *Zelman* Court began its analysis by mentioning the *Lemon* criteria,[361] as rephrased by *Agostini*, without giving them much weight.[362] The secular purpose of the Ohio program, to provide educational assistance to disadvantaged students in a failing inner-city school district, was undisputed.[363] The Court found that the Ohio program did not have the impermissible effect of either "advancing or inhibiting religion"[364] because the program was one of "true private choice" which provided only indirect aid to religious institutions.[365] In reaching this conclusion regarding the effect inquiry, the Court considered only the elements of individual choice and the neutrality of the aid given directly to the individuals.[366] The Court did not address indoctrination or the sectarian nature of the institutions benefiting from the voucher program, both of which had been relevant, and even conclusive, in prior cases.[367]

The presence of various nonreligious educational options in the Cleveland voucher program was enough for the *Zelman* Court to conclude that the aid to religious schools was indirect, and resulted exclusively from the "genuine and independent choices of private individuals."[368] Because individual recipients, rather than the government, ultimately decided where the voucher funds were spent, the *Zelman* Court reasoned that the program did not advance religion.[369] However, the Court did not take into account the fact that a significant amount of public money eventually reached "the coffers of religious schools"[370] because the Court ended its effects inquiry

361. *See supra* notes 52-55 and accompanying text.

362. The effects prong of the *Lemon* test, as rephrased by the *Agostini* Court, now asks the following questions when assessing whether educational assistance programs have the impermissible effect of advancing religion: 1) Does the program result in government indoctrination?; 2) Are the recipients defined by reference to religion?; and 3) Does the program foster an excessive government entanglement? *Agostini*, 521 U.S. at 234; *Lemon*, 403 U.S. at 612-13.

363. *See supra* note 276 and accompanying text.

364. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2465 (2002).

365. *Id.* at 2465-66.

366. *Id.* at 2465, 2473; *see* Simson, *supra* note 302, at 566-75. Although the Cleveland voucher program "may appear neutral on its face, it in fact strongly skews the choice of children and parents contemplating private school toward religious, rather than secular, private education." Simson, *supra* note 302, at 568.

367. *See* Wolman v. Walter, 433 U.S. 229, 250 (1977); Meek v. Pittenger, 421 U.S. 349, 365-66 (1975); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779-80 (1973); Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971); Frank, *supra* note 262, at 1054-57 (arguing that although the Sixth Circuit did not emphasize it, "the pervasively sectarian nature of many private schools could present a problem for voucher programs like that in Cleveland").

368. *Zelman*, 122 S. Ct. at 2465 (citing cases involving "true private choice" program).

369. *Id.* at 2466-68.

370. Agostini v. Felton, 521 U.S. 203, 228 (1997).

after declaring the Ohio program to be one of true private choice.[371] By focusing on this parental free choice reasoning, the Court essentially avoided applying the *Lemon* test to the facts of this case.[372]

The *Zelman* Court departed from its *Lemon* and *Nyquist* precedents in defining parental choice by reference to all the options available to the parents within the Cleveland School District.[373] At no point in its long line of cases involving aid to parochial schools did the Court ever look beyond the aid program in question and evaluate the available educational alternatives to enrolling in private school.[374] Prior to *Zelman*, the Court treated school aid programs as unique entities, separate from the other educational options that the state offered, and assessed the constitutionality of each program alone.[375]

The *Nyquist* Court, for example, looked only at the program under consideration in striking down New York's tuition reimbursement which was available only to the parents of students attending parochial schools.[376] In *Nyquist*, New York established the program to assist families paying tuition at parochial schools and thereby to prevent the enrollment of already struggling public schools from further increasing to unmanageable numbers.[377] The alternatives to private religious schools were not explored as they were in *Zelman*, and the *Nyquist* Court did not find it relevant that parents could choose to send their children to private or public schools. In evaluating solely the tuition reimbursement program and the influence it would have on the church and state relationship, the Court found that it had the effect of endorsing religion and thus violated the Establishment Clause.[378]

If the *Nyquist* Court had evaluated all of the alternatives available, the Court theoretically would have reached the same conclusion as in *Zelman*. In *Nyquist*, parents continued to have the option of sending their children to public school, and even had a financial incentive to choose public schools.[379] It is universally true that parents do not have to pay tuition for public schools, and opting for a private school forced parents to pay not only the rising costs of private education, but also property taxes supporting the public school system.[380] Rather than

371. *Zelman*, 122 S. Ct. at 2473.
372. *Id.* at 2467-68.
373. *See supra* notes 278-84, 289, 304-07 and accompanying text.
374. *See supra* notes 263, 267 and accompanying text.
375. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); *see infra* notes 376-83 and accompanying text.
376. *See supra* notes 315-18 and accompanying text.
377. *Nyquist*, 413 U.S. at 761-67, 795.
378. *Id.* at 794 (finding that the *Nyquist* program had "the impermissible effect of advancing religion").
379. *Id.* at 782 n.38.
380. *Id.* at 812 (Rehnquist, J., joined by Burger, C.J. & White, J., dissenting in part).

look at the purpose behind New York's statute or at the non-religious educational options, the Court found the program impermissible because the state provided benefits only to those parents who chose private schools.[381]

If it had relied on *Nyquist*, the *Zelman* Court would have likewise found Ohio's voucher program to be impermissible because funds were available almost exclusively to those parents electing sectarian education for their children.[382] Evaluating only the Ohio voucher program itself and the benefits conferred to sectarian schools, the *Zelman* Court would have seen a program that essentially provided unrestricted funds to sectarian schools. When viewed in this light, the *Zelman* program would have looked like unregulated state aid to schools that indoctrinate their students with religious principles and would have been found to violate the Establishment Clause.[383]

As in *Nyquist*, the *Lemon* Court struck down two programs providing salary supplements to sectarian schoolteachers, without considering whether there were viable alternatives to parochial schools.[384] The Court concluded that because of the indoctrinating effect of government-sponsored programs that directly pay sectarian teachers' salaries, the programs were unconstitutional.[385] Additionally, the programs in *Lemon* included restrictions on the types of courses sectarian teachers could teach and the materials they could use,[386] as a means of ensuring "that subsidized teachers do not inculcate religion."[387] Although the restrictions were designed to eliminate the danger of indoctrinating students with religious beliefs, the Court found that the need for "a comprehensive, discriminating, and continuing state surveillance" to enforce these restrictions would "involve excessive and enduring entanglement between state and church."[388] If the *Zelman* Court had followed the *Lemon* reasoning, it would have struck down the Ohio program, finding that unrestricted funds were given to sectarian schools and were used to pay teachers whose job involved religious indoctrination.[389]

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381. *Id.* at 783 (finding that "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions").

382. *See supra* notes 230-35, 244-47 and accompanying text. That public schools can participate in the program does not make public education a viable alternative because vouchers could not technically be used to attend a public school. Effectively, the choice is limited to participating schools.

383. *See supra* notes 52-55 and accompanying text.

384. *See supra* Part I.A.1.

385. *See supra* notes 44-46 and accompanying text.

386. Teachers receiving public funds "must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools," and "must not engage in teaching any course in religion." Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

387. *Id.*

388. *Id.*; *see infra* notes 408-11 and accompanying text.

389. *See* Simson, *supra* note 302, at 571-72. The *Zelman* Court rejected the Lemon

In *Zelman*, Ohio implemented its voucher program in order to expand the educational options available to disadvantaged students in school districts which continually performed below state and national standards.[390] The Court emphasized the fact that, without the voucher program, most of the low-income students benefiting from the program would have been forced to accept a sub-par education because of their inability to pay for a superior one.[391] Additionally, the Court focused on the indirect nature of the aid—that it was first sent to parents who then endorsed the check over to the school—to circumvent the need to look further at the *Lemon* criteria.[392] Had the funds been sent directly from the State to the sectarian schools, or had the voucher program restricted participation to private religious schools, the Court would likely have followed its Establishment Clause precedent more closely. Moreover, the decision in *Zelman* is limited in scope and applies only to the specific facts—not only of the Ohio Pilot Program, but also of the Cleveland School District itself. Thus, the outcome of *Zelman*, when considered in light of the factors deemed most salient by the Court, does not overrule either *Lemon* or *Nyquist*.[393]

2. The *Zelman* Court Ignored the Lack of Safeguards, the Payment of Sectarian Teachers' Salaries, and the Direct Nature of the Aid in the Cleveland Voucher Program

In prior school aid cases, the presence of certain features in the challenged programs proved crucial to the Court's determination of constitutionality.[394] Some aspects rendered the programs almost automatically unconstitutional, such as the lack of safeguards to

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Court's understanding "that financial support of religion is constitutionally problematic regardless of whether it takes the form of endorsement." *Id.* at 572; *see also* App. OO, J.A. at *293a, Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002) (No. 00-1751, 00-1777, 00-1779) (providing excerpts from the handbooks of the private religious schools participating in Cleveland's voucher program).

390. Cable News Network, *Bush Praises Supreme Court Voucher Ruling* (July 1, 2002), *at* http://www.cnn.com/2002/ALLPOLITICS/07/01/bush.speech/index.html. President Bush commended the *Zelman* Court's decision: "'What's notable and important . . . is that the [C]ourt declared that our nation will not accept one education system for those who can afford to send their children to a school of their choice and for those who can't, and that's just as historic.'" *Id.*; *see supra* Part II.A.

391. *See supra* note 247 and accompanying text.

392. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2468-69 (2002).

393. *See supra* Part III.A.1.

394. *See* Green, *supra* note 346 at 563. The Cleveland voucher program

> possesses all of the qualities the Court had found fatal to funding programs: an unrestricted cash grant that is divertible for indoctrination and other religious uses—a benefit that is designed to pay for the entire educational enterprise, thus supplanting private school functions by "reliev[ing] sectarian schools of [the] costs they otherwise would have borne in educating their students."

Id. (citations omitted).

restrict the use of public funds for sectarian purposes,[395] the use of state aid to provide for basic education,[396] the payment of sectarian teachers' salaries,[397] and government disbursement of funds directly to religious schools. Although the Cleveland voucher program contained no safeguards, directly funded basic education at sectarian schools, and subsidized teachers salaries, the *Zelman* analysis did not address these factors.

a. *Lack of Safeguards*

The presence of safeguards to prevent the actual diversion of government funds for non-secular uses was a decisive factor in Justice O'Connor's *Mitchell v. Helms* concurrence.[398] The program in question loaned educational equipment and computers to both public schools and private religious schools, and the statute itself contained several provisions aimed at ensuring that the government aid remained separate from the sectarian function of the schools.[399] The Court has not definitively ruled on the constitutional necessity of

395. *See* Mitchell v. Helms, 530 U.S. 793, 861-62, 867 (2000) (O'Connor, J., joined by Breyer, J., concurring in the judgment). The concurrence found that the safeguards contained in the *Mitchell* program were "constitutionally sufficient," and "[r]egardless of whether [safeguards] are [a] constitutional requirement[], they are surely sufficient to find that the program . . . does not have the impermissible effect of advancing religion." *Id.* at 861, 867; *see infra* notes 398-404. The Court has not definitively ruled on the constitutional necessity of safeguards. Four Justices in *Mitchell* concluded that: "the evidence of actual diversion and the weakness of the safeguards against actual diversion are not relevant to the constitutional inquiry." *Mitchell*, 530 U.S. at 834 (Thomas, J., joined by Rehnquist, C.J., Scalia & Kennedy, JJ., announcing the judgment of the Court). Both Justice O'Connor's concurrence and Justice Souter's dissent (joined by Justices Stevens and Ginsburg) echoed the sentiment that safeguards against impermissible use of government funds are necessary and relevant to the constitutional inquiry. *Id.* at 861 (O'Connor, J., concurring); *id.* at 908 (Souter, J., dissenting). The dissent maintained that "[p]roviding such governmental aid without effective safeguards against future diversion itself offends the Establishment Clause, and even without evidence of actual diversion, our cases have repeatedly held that a 'substantial risk' of it suffices to invalidate a government aid program on establishment grounds." *Id.* at 908 (Souter, J., dissenting) (citations omitted).

396. *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

397. *See id.* at 620-21.

398. *Mitchell*, 530 U.S. at 861 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

399. *Id.* at 861-63 (O'Connor, J., joined by Breyer, J., concurring in the judgment). Justice O'Connor found that the numerous safeguards contained in the statute were adequate to satisfy the constitutional inquiry. *Id.* (O'Connor, J., joined by Breyer, J., concurring in the judgment). The statute requires: all private schools to sign assurances that the schools will limit the use the funds received from this program to "'secular, neutral, and nonideological services'"; that the state department of education will conduct periodic monitoring visits; and that the equipment bear labels indicating it belongs to the Chapter 2 program. *Id.* (O'Connor, J., joined by Breyer, J., concurring in the judgment) (citing 20 U.S.C. § 7372(a)(1)); *see supra* Part I.C.2.

safeguards.[400] However, both Justice O'Connor's concurrence (joined by Justice Breyer) and Justice Souter's dissent (joined by Justices Stevens and Ginsburg) echoed the sentiment that safeguards against impermissible use of government funds are necessary and relevant to the constitutional inquiry.[401]

The facts of the Ohio Pilot Project Scholarship Program indicate that no safeguards were included in its design.[402] The State sent funds directly to the participating schools, and the only limitation on the use of the funds was that parents had to first endorse the checks over to the schools.[403] Once the aid reached the private schools, the voucher program placed no restrictions on the manner in which the funds were allocated.[404] The *Zelman* Court did not address the lack of safeguards within the Cleveland voucher program to prevent the use of State aid for sectarian purposes. As Justice Breyer's dissenting opinion noted, the *Zelman* majority did not consider the fact that the aid in *Mitchell*—educational equipment and computers—had significantly less potential for diversion than the direct monetary support provided by the Cleveland program.[405]

b. *Payment of Teachers' Salaries*

Lemon expressly prohibits state payment of sectarian teachers' salaries because of the danger of religious indoctrination,[406] and the Court has never overruled this prohibition.[407] The Cleveland program

400. *See supra* note 395 and accompanying text.

401. *Mitchell*, 530 U.S. at 861 (O'Connor, J., joined by Breyer, J., concurring); *id.* at 908 (Souter, J., joined by Stevens and Ginsburg, JJ. dissenting). See *supra* note 395 for the dissent's position on safeguards.

402. *See supra* Part II.A.

403. *See supra* note 243 and accompanying text.

404. Justice O'Connor distinguished the facts of *Zelman* from previous indirect aid cases that the Court has upheld "in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds." Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002) (O'Connor, J., concurring).

405. *Id.* at 2507 (Breyer, J., joined by Stevens and Souter, JJ., dissenting). The dissent distinguished the aid in *Mitchell* from the aid in *Zelman*:

> State aid [in] . . . the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. . . . [T]he secular aid upheld in *Mitchell* differs dramatically from the present case. Although it was conceivable that minor amounts of money could have . . . found their way to the religious activities of the recipients, that case is at worst the camel's nose, while the litigation before us is the camel itself.

Id. (Breyer, J., joined by Stevens & Souter, JJ., dissenting) (citations omitted).

406. Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971). The Court "recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . . [A] teacher would find it hard to make a total separation between secular teaching and religious doctrine." *Id.*

407. *See supra* Part I.A.1.

gave voucher funds directly to the sectarian schools as a tuition payment, which the schools could use in the same manner as private tuition payments. Without any limitation on the use of public funds, the Cleveland program had no mechanism to prevent the "actual diversion" of funds for purely sectarian purposes in contravention of the Establishment Clause. The predominant expenses of private religious schools are directly related to the basic education of students, namely teachers' and administrators' salaries, textbooks, and educational equipment. In addition, the Court has stated, on more than one occasion, that one of the recognized functions of sectarian schools is the religious formation of students.[408] Moreover, the *Lemon* Court reasoned that efforts by teachers in sectarian schools to instruct secular classes without injecting religion into the curriculum were not sufficient to eliminate the "potential for impermissible fostering of religion."[409] Because "total separation between secular teaching and religious doctrine"[410] is nearly impossible for teachers to achieve, the Court held that payment of sectarian teachers' salaries violated the Establishment Clause.[411]

The *Zelman* Court did not discuss the fact that a large portion of the state funds were inevitably used to pay the salaries of teachers in the sectarian schools where parents spent voucher funds. If the *Zelman* Court had relied on the *Lemon* precedent, it would likely have struck down the Cleveland program because Ohio essentially funded the religious indoctrination of schoolchildren.

c. *Direct Aid to Sectarian Schools and the Funding of Basic Education*

Until *Zelman*, the Court had never upheld a state-funded program that provided direct aid to sectarian schools to fund basic educational expenses. The nature of the aid provided to parents in Cleveland is distinguishable from the state aid in *Mueller*, *Witters*, and *Zobrest*. In *Mueller*, parents received a tax deduction for educational expenses;[412] in *Witters*, a blind student received funds under a vocational

408. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778-79 (1973); *Lemon*, 403 U.S. at 616, 618-19.

409. *Id.* at 619. The Rhode Island Salary Supplement Act required that "any teacher applying for a salary supplement must first agree in writing 'not to teach a course in religion for so long as or during such time as he or she receives any salary supplements' under the Act." *Id.* at 608.

410. *Id.* at 619.

411. *Id.* The Court stated that it did not assume that teachers in sectarian schools were inherently unable to separate religious doctrine from the curriculum. *Id.* The Court concluded, however, that a sectarian teacher would be unable to completely separate the secular education from the religious mission of such schools. *Id.* at 618; *see supra* note 406 and accompanying text.

412. Mueller v. Allen, 463 U.S. 388 (1983); *see supra* notes 142-50 and accompanying text.

rehabilitation program;[413] and in *Zobrest*, the state provided a sign-language interpreter for a deaf student.[414] In all three cases, the government funds provided services directly to the individual who received the program benefits.[415]

The state aid provided in each of these programs was not intended to pay for the basic education of students. Instead, the recipients received services which merely supplemented their basic education.[416] In contrast, the Cleveland program gave funds to sectarian schools for the sole purpose of paying the tuition of low-income students.[417] Although the aid was indirect in the sense that the checks were made out to parents, the funds directly benefited private sectarian schools which used the funds to pay for the basic expenses of salaries, educational materials, and building maintenance.[418] The Court has repeatedly stated that aid to sectarian schools necessarily advances the religious goals of such schools, and thus is impermissible.[419] Moreover, because the secular education and religious mission of sectarian schools are intricately intertwined, state aid unavoidably furthers the schools' religious purpose.[420] The *Zelman* Court rejected these principles although they had formed the basis of its Establishment Clause jurisprudence for the last twenty-five years.

Indeed, prior to *Zelman*, the Court had never upheld a school aid program which gave unrestricted tuition payments directly to sectarian schools.[421] In each case where the Court found aid to sectarian schools permissible under the Establishment Clause, the Court emphasized the supplemental nature of the aid.[422] In *Mitchell*,

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413. Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986); *see supra* notes 151-56 and accompanying text.

414. Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993); *see supra* notes 157-62 and accompanying text.

415. *See supra* notes 285-300 and accompanying text.

416. *See supra* text accompanying notes 412-15; *see also supra* Part I.B.

417. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2463-64 (2002); *see supra* Part II.A. The Court stated that "the program challenged here was enacted for the . . . purpose of providing educational assistance to poor children in a demonstrably failing public school system." *Zelman*, 122 S. Ct. at 2465.

418. *See Zelman*, 122 S. Ct. at 2488-90 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (distinguishing between the cases in which students or a particular group of individuals directly benefited from state aid and cases like *Zelman* where the beneficiary of the aid is clearly sectarian schools).

419. Meek v. Pittenger, 421 U.S. 349, 366 (1975).

420. Wolman v. Walter, 433 U.S. 229, 250 (1977).

421. *See supra* note 394 and accompanying text.

422. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 848-49 (2000) (O'Connor, J., concurring); Agostini v. Felton, 521 U.S. 203, 228 (1997); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). Prior to the *Zelman* decision, "the Court in numerous direct and indirect parochial school aid cases has decided constitutionality by asking whether the aid is limited to secular aspects of the parochial school operation or instead extends to aspects of the school's religious mission." Simson, *supra* note 302, at 572-73. Relying on this approach:

> [T]he Court has long been accepting of such aid as providing for children's

for instance, the Court considered the textbooks and supplies made available to students supplemental to the education provided.[423] The *Agostini* Court also emphasized the supplemental nature of the remedial services provided to students in sectarian schools.[424] Moreover, the programs in both *Agostini* and *Mitchell* contained safeguards to ensure that the state-funded benefits remained secular.[425] The textbook loans in *Allen* and the busing services provided by the state in *Everson* were also upheld as supplemental aid.[426] In each case, the Court found that the government was not subsidizing sectarian education itself; rather, it was providing a service to all schoolchildren to supplement their education.[427]

In contrast to these prior cases, the Ohio voucher program provides aid directly to predominantly sectarian schools. Prior to 2002, the Court had never upheld a direct aid program resembling that of Cleveland.[428] In upholding the aid, the *Zelman* majority took an unprecedented approach to the question of whether the Cleveland voucher program violated the Establishment Clause.[429] This approach, criticized by the dissenting Justices,[430] allowed the Court to

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> bus transportation to and from parochial school, but it has invalidated such aid as maintenance and repair grants that the parochial schools would be free to spend on the upkeep of facilities used in whole or in part for religious instruction or prayer.

Id. at 573.

423. *Mitchell*, 530 U.S. at 802; *id.* at 848 (O'Connor, J., concurring); *see supra* notes 213-18 and accompanying text.

424. *Agostini*, 521 U.S. at 210.

425. *See supra* Part III.A.2.a; *see also Agostini*, 521 U.S. at 234-35 (upholding the Title I program because it provided supplemental aid on a neutral basis and contained sufficient safeguards).

426. *See supra* Part I.B.

427. *See supra* Part I.B.

428. *See supra* Part II.C.3 (discussing the dissenting opinions in *Zelman* which note the majority's departure from its Establishment Clause precedent).

429. Justice Souter clearly articulated the history of the Court's jurisprudence with respect to state aid to religious education:

> In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.

Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2486 (2002) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting).

430. *Id.* at 2485-502 (Souter, J., dissenting); *see also* Bernard James, *Empowering Educators*, Nat'l L.J., Aug. 5, 2002, at C7 (stating that "[t]o the dissenting justices in

conclude that, despite the direct and non-supplemental nature of the aid, the Cleveland voucher program was not impermissible.[431]

B. *Not All School Voucher Programs Are Permissible Under* Zelman

The *Zelman* decision was ostensibly a success for all voucher programs offering superior educational alternatives to children attending failing inner-city public schools. However, *Zelman*'s success was not sufficiently far-reaching to guarantee that voucher programs that are not carefully modeled on the Cleveland program will pass constitutional muster.[432] Specifically, a court following the *Zelman* holding may strike down as impermissible a voucher program that offers fewer educational choices than the Ohio program because such a program would not offer parents a "genuine" choice.

A voucher program that does not closely mirror that of the Ohio program in terms of the range of educational options, the private choices of parents, and the public educational crisis will probably fail a challenge in federal court. The key factor in *Zelman* was the presence of a genuine and independent choice which the voucher program afforded parents.[433] In Cleveland, parents could choose either to use a voucher at a private sectarian school or to enroll their children in a magnet or community school as an alternative to inner-city public education.[434] It was the availability of all of these options—not merely failing public schools versus private religious schools—which allowed the Court to characterize the parental choice as "genuine."[435] While the *Zelman* Court emphasized the range of available alternatives, the Court did not specifically address whether a parent faced with the choice of a failing public school or a sectarian school has a "genuine" choice in the constitutional sense.[436] Although other states may

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Zelman, the establishment clause violation was a no brainer").

431. See *supra* Part II.C.1 (explaining the majority's opinion in *Zelman*.)

432. Green, *supra* note 346, at 576-77 (discussing that although the Court gave "a green light to private school vouchers, the effect of private choice on education policy and constitutional law remains illusionary").

433. *Zelman*, 122 S. Ct. at 2465-69; *see* James, *supra* note 430, at C7 ("Provided the choices are legitimate and the funding is 'neutral in all respects toward religion' there is no constitutional issue.").

434. *Zelman*, 122 S. Ct. at 2469.

435. *Id.* Chief Justice Rehnquist elaborated on the genuine options available to Cleveland parents:

> There . . . is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school.

Id.

436. *See supra* text accompanying notes 343-45 (discussing the dissent's criticism of the *Zelman* majority's reasoning).

imitate the Ohio program letter-for-letter, it is unlikely that every other school district in the country will provide the same range of alternatives offered by the Cleveland voucher program.

After *Zelman*, if a state adopted a voucher program similar to that of Cleveland in all respects, except that the voucher funds could be used only at participating private schools (assuming that 82% of these schools are religiously-affiliated as in *Zelman*),[437] and the only other educational alternative was a failing public school system, such a program would be unconstitutional. In this situation, parents would have to choose between a sectarian school that fits the *Lemon* profile of religious pervasiveness, and a public school labeled "failing." Although *Zelman* did not determine whether such a choice is "genuine,"[438] it is clear that most parents would opt for the private school choice and would not consider a failing public school to be a viable alternative. In such a case, the government would effectively be providing a financial incentive for parents to choose sectarian over public education. Regardless of the secular intent of such a program, the effect would be an impermissible endorsement of religion.

Although the majority did not clarify what would constitute "genuine choice" in future voucher programs, Justice O'Connor's concurrence sheds some light on the issue. O'Connor explained that "[f]or nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents."[439] Based on Justice O'Connor's definition, it is not necessarily the number of choices available to parents, but the parents' subjective opinion of the quality of the choice that determines whether the choice is "genuine."

It comes as no surprise that in the wake of *Zelman*, many states are developing and implementing their own school voucher programs.[440] Recently, these states have been faced with lawsuits by voucher proponents seeking to "remove[] state constitutional roadblocks that ban public funding for religious schools."[441] Lawsuits have already been filed in Florida, Massachusetts, Maine, and Washington, and are

437. *See supra* notes 244-46 and accompanying text.

438. Justice O'Connor provided some guidance on the issue of "genuine" choice. *See supra* note 439 and accompanying text.

439. *Zelman*, 122 S. Ct. at 2477 (O'Connor, J., concurring).

440. Tresa Baldas, *School Voucher Suits Hitting States*, Nat'l. L.J., Jan. 13, 2003, at A1; *see also* James, *supra* note 430, at C7 (noting that "[c]urrently, at least nine states are promoting the concept [of vouchers] . . . . [and] [e]xperimentation with vouchers may soon become the norm rather than the exception"); *see* Simson *supra* note 302, at 575. In addition, the Federal government is considering school voucher legislation. *See* Associated Press, *Republicans Push School Voucher Bill* (Feb. 14, 2003), *available at* http://www.cnn.com/2003/EDUCATION/02/14/special.education.ap/index.html (discussing that "Senate Republican leaders are proposing legislation that would expand school vouchers").

441. Baldas, *supra* note 440, at A1.

expected in Vermont, Texas, Colorado, Missouri, Virginia, and South Carolina as well.[442] The state lawsuits differ significantly from *Zelman* in that they all focus on the permissibility of voucher programs under state constitutions.[443] Some state lawsuits are even challenging whether state laws prohibiting any aid to sectarian schools are constitutional.[444] Because state constitutions can be more restrictive than the United States Constitution,[445] *Zelman* may not impact the decisions made pursuant to state constitutional requirements.

Some states have implemented voucher programs that may not provide adequate alternatives to failing public schools.[446] For example, in 1999, Florida enacted the Opportunity Scholarship Program ("OSP"),[447] a statewide voucher program that allows students in failing public schools to attend nearby higher-performing public schools, or to apply for a voucher to attend a private school.[448]

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442. *Id.* at A1, A8 (noting that the Florida voucher case, *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079, at *3 (Fla. Cir. Ct. Aug. 5, 2002), has received the most attention because the circuit court judge struck down the voucher program as a violation of the Florida State Constitution).

443. Baldas, *supra* note 440 at A1, A8-A9. In Florida, for example, "the big issue before the appellate court is whether the state's voucher program violates the religion clause in the state's constitution." *Id.* at A9; *see* Simson, *supra* note 302, at 576.

444. Vanessa Blum, *Voucher Fight is Maine Event*, Legal Times, Sept. 23, 2002, at 10 (discussing a lawsuit in Maine seeking to overturn a 1981 law which permits the state to spend public funds to pay private school tuition for students residing in areas with no public high schools, but prohibits the state from paying for religious education).

445. Jodie Morse, A Victory for Vouchers: The Supreme Court Upholds School Choice. But Will its Decision be the Final Word on Education Reform? (July 1, 2002), *available at* http://www.cnn.com/2002/ALLPOLITICS/07/01/time.vouchers/index.html (stating that "[d]ozens of states have constitutions more restrictive than the federal charter.... [S]ome of them contain blanket assurances of 'universal access' to public education, [but] three dozen have another legal hurdle: the so-called Blaine Amendment... which expressly bans the transfer of public money to religious schools").

446. While school choice proponents saw *Zelman* as opening the door for more states to implement voucher programs, many state proposals have been struck down. According to one source, "[c]urrently only Cleveland, Florida and Milwaukee, Wis[consin], have voucher programs. In 2000, voters in Michigan and California trounced statewide voucher initiatives... [and] 26 other states have voted down voucher legislation." Morse, *supra* note 445; *see also* Terry Frieden, *Supreme Court Affirms School Voucher Program* (June 27, 2002), *at* http://www.cnn.com/2002/LAW/06/27/scotus.school.vouchers/. After the *Zelman* decision, "[w]ith the crucial constitutional hurdle behind them, proponents of school voucher programs are already looking ahead to expand their 'school choice' agenda and say the decision provides a boost to voucher programs in Milwaukee and Florida." *Id.* (quoting John Kramer, spokesman for the Institute for Justice). Voucher advocates expect school choice programs to be implemented in many other states. Among them are Minnesota, Colorado, Texas, Arizona, Indiana, Virginia, Alabama, and Utah. *Id.*; *see supra* notes 442-44 and accompanying text.

447. Fla. Stat. Ann. § 1002.38 (West Supp. 2003) (formerly Fla. St. 2001, § 229.082).

448. *Id.* § 1002.38(1)-(3). The Florida statue provides, in pertinent part:

> [A] student should not be compelled, against the wishes of the student's parent, to remain in a school found by the state to be failing for 2 years in a

The purpose of the Florida statute is to ensure that no students are forced to attend a failing public school.[449] Therefore, any student who attended a public school during the last school year, or who is assigned to attend during the next year, a school found to be failing for two of the last four years is eligible for the OSP.[450] Although the Florida Circuit Court held in August 2002[451] that the OSP violated the religion clause of the Florida state constitution,[452] the program illustrates the lack of "genuine" choice that may lead a federal court to hold similar programs unconstitutional even after *Zelman*.

While Florida's OSP appears to afford parents many educational alternatives to failing public schools, in reality the only other viable option may be sectarian education. Many of the public schools that the state has designated as performance grade category "F" for two of the last four years are likely to be in an inner-city area, very similar to the Cleveland School District. If this is the case, the other public schools within the district will probably not be performing at a higher level, and therefore will not provide a legitimate option for parents.[453] In addition, the adjacent public school districts may have also been labeled failing. Even assuming the adjacent districts are a viable alternative, the districts are only required to accept students under the OSP based on the amount of space available in the schools.[454] Thus,

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> 4-year period. The Legislature shall make available opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school . . . .

Id. § 1002.38(1).

449. *Id.*

450. *Id.* § 1002.38(2)(a). The OSP allows parents of eligible students to choose "to enroll the student in the public school within the district that has been designated by the state . . . as a school performing higher than that in which the student is currently enrolled or to which the student has been assigned, but not less than performance grade category 'C.'" *Id.* § 1002.38(3)(a)(2).

451. *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079, at *1 (Fla. Cir. Ct. Aug. 5, 2002).

452. The Florida Constitution, article I, § 3, provides: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

453. *See* Joseph P. Sullivan, *Solving Education Reform Disputes: Judicial Involvement Will Increase*, N.Y. L.J., May 1, 2001, at S1. The problem of failing schools in New York City "has traditionally been . . . most acute." *Id.* As of December 2000, "98 of the 114 schools on the list are located within the five boroughs," and the previous year, "25 schools across New York State, including five that had previously been taken off the list, were added to the Commissioner of Education's list of failing schools." *Id.* Unfortunately, this "trend is not limited to New York City." *Id.* Therefore, parents using vouchers in other urban areas nationwide will probably not have "genuine" public school alternatives because many will be labeled failing.

454. Fla. Stat. Ann. § 1002.38(3)(a)(2)(b).

the adjacent public schools will only provide an educational alternative to a limited number of students. Moreover, parents, especially those with young children, will not likely opt for a school that is far outside their district.

Given this scenario, students attending failing public schools in Florida have only the option of attending private schools, many of which are sectarian, or remaining in "failing" public schools. Faced with this choice, parents are more likely to choose a superior sectarian education over a second-rate public education. If the choices afforded parents are, in reality, *not* viable options, as in the Florida scenario, the parents' choice may not actually be "genuine" in the *Zelman* sense.[455] Where the secular options are far inferior to the sectarian ones, the state is effectively providing a financial incentive to choose a religious school.

Even after *Zelman*, which removed the Establishment Clause barrier to state funding of religious institutions,[456] a program such as Florida's OSP probably will fail an Establishment Clause challenge.[457] Following Justice O'Connor's definition of "genuine," courts may find that failing public schools are not "adequate substitutes for religious schools."[458] Therefore, it is likely that a voucher program providing only a failing public school as the alternative to sectarian education will be struck down.

CONCLUSION

The Supreme Court's decision in *Zelman* drastically altered the debate over the constitutionality of school vouchers. This decision not only marked a departure from over fifty years of Establishment Clause precedents, but *Zelman* also introduced a new analytical tool for assessing the constitutionality of school aid programs. In contrast to prior decisions, the *Zelman* Court focused predominantly on individual choice and the neutrality of the aid to conclude that the program did not create an impermissible endorsement of religion. In upholding the Cleveland voucher program, the Court did not consider that the program funds went directly to sectarian schools in the form of tuition payments without restrictions or safeguards to ensure the aid was used for only secular purposes.

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455. If parents do not view the failing public school as a reasonable alternative to private school, the choice is not "genuine" under Justice O'Connor's definition. *See supra* note 439 and accompanying text.

456. *See supra* note 17 and accompanying text.

457. James, *supra* note 430, at C7. Unfortunately, "the *Zelman* decision does little or nothing to provide clarity in establishment clause doctrine generally. After *Zelman*, one knows that voucher programs are valid, but would have a hard time distinguishing a good voucher program from one that is unconstitutional." *Id.*

458. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2477 (2002) (O'Connor, J., concurring); *see supra* text accompanying note 439.

The *Zelman* decision removed many of the Establishment Clause barriers to state-funded programs providing aid to sectarian institutions. While the Court's opinion indicates that voucher programs similar in design to Cleveland's will withstand an Establishment Clause challenge, there is less certainty about how federal courts will treat programs with fewer educational alternatives. The *Zelman* Court emphasized the presence of a "genuine and independent choice" allowing parents to select a school from a number of secular options as well as from private sectarian schools, although the Court did not clarify what it meant by a "genuine" choice. Following Justice O'Connor's definition of genuine choice provided in her concurrence, a federal court would consider a choice genuine if parents believed that a "reasonable alternative" to sectarian education existed. After *Zelman*, a voucher program offering a choice only between a failing public school and a private, religiously affiliated school probably will not survive an Establishment Clause challenge. For these reasons, it is clear that *Zelman* will not be the last word on school vouchers.